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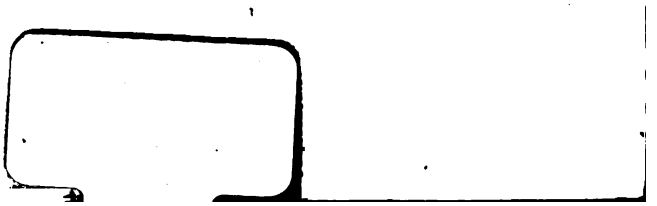

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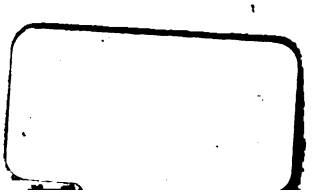

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DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

THE SECOND EDITION, REVISED AND ENLARGED.

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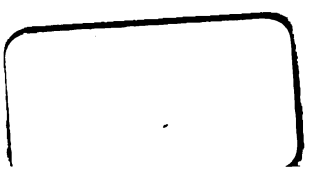

Page

59. Tenants in Dower and by the Curtesy - - 83
60. Tenants for Years - - - - 84
62. Guardians - - - - - id.
63. Executors and Administrators - - - id.
64. Joint Tenants, Coparceners, and Tenants in Common id.
65. Copyholders - - - - 85
66. Who are incapable of making Leases - - id.
67. Infants - - - - - id.
69. Married Women - - - 86
70. Of void and voidable Leases - - - id.
86. Who may be Lessees - - - - 90

CHAP. VI.

Of an Exchange, Partition, Release, and Confirmation.

1. Exchange - - - - 92
7. Must be in Writing, and executed - - 93
10. Who may exchange - - - - - 94
13. Can only be between Two Persons - - id.
15. Partition - - - - - 95
20. Release - - - - - 96
23. Operative Words - - - - 97
25. How Releases enure - - - - id.
26. Mitter L' Estate - - - - id.
30. Mitter Le Droit - - - - 99
32. Enlargement - - - - id.
43. Extinguishment - - - - 101
46. What may be released - - - 102
49. Confirmation - - - - 103

CHAP. VII.

Of a Surrender, Assignment, and Defeazance.

1. Surrender - - - - 106
5. Must be by Deed or Note in Writing - - 107
8. Who may surrender - - - 108
9. What Estate necessary - - - 109
15 Assignment - - - - 111
20. Must be by Deed or Note in Writing - - 112
21. What may be assigned - - - id.
25. Defeazance - - - - 113

CHAP. VIII.

Of a Bond and Recognizance.

		Page
1.	A Bond	115
8.	Its Effect as to the Obligor	117
10.	As to his Heir	id.
13.	As to a Devisee	118
14.	Where the Remedy may exceed the Penalty	id.
16.	Bonds to the King	id.
19.	Recognizance	119
26.	Bonds and Recognizances are assignable	121
29.	Defeasance of a Bond	id.

CHAP. IX.

Of a Bargain and Sale.

1.	Deeds derived from the Statute of Uses	122
4.	Bargain and Sale	123
12.	Who may convey by	125
17.	What may be conveyed by	126
20.	Requires a pecuniary Consideration	127
30.	A Rent may be reserved	128
31.	Must be enrolled	129
37.	Exceptions—Lands in Cities	130
38.	And Terms for Years	id.
39.	Relation of Enrolment	id.

CHAP. X.

Of a Covenant to stand seised.

1.	Nature of	133
9.	Who may covenant to stand seised	135
10.	What may be conveyed by	id.
13.	What Consideration necessary	136
27.	A Use only arises to the Persons within the Consideration	139
31.	The Estate continues till a Use arises	140
32.	A Rent may be created by	id.
34.	No Estate is devested by this Conveyance, or by a Bargain and Sale	id.
37.	No Uses can be declared on these Conveyances	141

CHAP. XI.

Of a Lease and Release.

		Page
1.	Origin and Nature of	142
9.	Who may convey by	144
10.	What may be conveyed by	id.
11.	Estates in Remainder and Reversion	id.
14.	Incorporeal Hereditaments	145
15.	What Consideration necessary	id.
18.	Does not devest any Estate	146
20.	Whether the Use results on it	id.
22.	To whom the Title Deeds belong	147

CHAP. XII.

Of Declarations of Uses.

1.	Origin and Nature of	149
2.	Must be by Deed or Writing	id.
5.	No technical Words necessary	150
8.	How the Lands should be described	151
9.	No Consideration necessary	id.
11.	Deeds to lead Uses	152
18.	Deeds to declare Uses	159
27.	Who may declare Uses	161
28.	Infants	162
32.	Married Women	id.
37.	Idiots and Lunatics	165
38.	The Right to declare Uses is co-extensive with the Estate	id.
42.	Uses may be declared on a Lease and Release	166
44.	The Releasee cannot dissent	id.

CHAP. XIII.

Of Powers of Revocation and Appointment.

1.	Common Law Powers	168
3.	Powers derived from Uses	169
5.	Powers relating to the Land	id.
6.	Appendant	id.
10.	Or in Gross	170
12.	Powers collateral to the Land	171

Page

14. In what Deeds inserted - - - 171
15. By what Words - - - - id.
24. A Power to appoint implies a Power to revoke, not *e contra* - - - - 174
26. But includes a Right to reserve a new Power - id.
28. Unless the Power be collateral - - - 176
30. To whom Powers may be given - - id.
31. Infants - - - - - id.
33. Married Women - - - - 181
46. Who may be Appointees - - - 185
48. A Power does not suspend the vesting of Remainders 186

CHAP. XIV.

Of Powers to Jointure.

1. Origin and Nature of - - - 190
3. Restriction as to clear yearly Value - - id.
6. Proportioned to the Fortune of the Wife - - 196

CHAP. XV.

Of Powers to lease.

1. Origin and Nature of - - - 200
4. Restrictions annexed to - - - 202
5. 1°. As to the Instrument - - - id.
7. 2°. As to the Lands to be leased - - id.
13. A Qualification destructive of a Power, dispensed with 204
21. 3°. As to the Time when a Lease is to commence - 210
22. A general Power only authorizes Leases in Possession 211
26. Unless the Estate is reversionary - 212
31. Does not authorize a Lease to commence after a subsisting Lease - - - - 213
36. But concurrent Leases are good - - 216
40. Of Powers to lease in Reversion - - 217
43. 4°. As to the Duration of the Lease - - 218
48. 5°. As to the Rent to be reserved - - 220
49. What is the ancient Rent - - - id.
56. How to be reserved - - - - 225
61. What is the best Rent - - - - 226

Page

68. 6°. As to the Clauses and Covenants - - 226
70. In what Conveyances Leasing Powers may be inserted - 228

CHAP. XVI.

Of the Execution of Powers.

1. May be restrained by Circumstances. - - 229
11. Where the Instrument is specified it must be adopted - 235
13. A Power given generally may be executed by Deed or Will - - - - 236
18. But they must be properly executed - - 238
20. Unless the Power is collateral - - - id.
23. A Will executing a Power retains all its Properties - 239
26. The Power need not be recited - - - 240
30. But the Instrument must refer to the Estate - 241
34. A Power may be executed by several Assurances - 244
37. And at different Times - - - - 245
41. An Appointment may be a Revocation *pro tanto* - 246
44. Where a Power is exceeded, the Excess only is void id.
50. An Appointment may give a lesser Estate - - 249
54. Or direct a Sale and appoint the Money - - 251
57. Must not be illusory - - - - 252
64. A Power cannot be delegated to another - - 256
67. Unless there are special Words - - - 257
69. In what Cases an Instrument operates as an Appointment - - - - 258
74. Effects of the Execution of a Power - - 264
79. Will not defeat a prior Estate - - - 266

CHAP. XVII.

Where Equity will support a defective Execution of a Power.

1. Equity will support a defective Execution - - 267
2. In Favour of a Wife - - - - 268
9. In Favour of a Husband - - - 272
12. In Favour of Children - - - 273
15. Though provided for - - - 274
16. In Favour of Creditors - - - 275
17. And of Purchasers for a valuable Consideration - id.
20. But not for Volunteers - - - - 276

Page
22. Where there is Fraud. - - - - 276
24. Where a complete Execution is prevented by Accident 277
25. But a Non-execution will not be supplied - - id.

CHAP. XVIII.

How Powers may be extinguished and destroyed.

1. A complete Execution - - - - 281
3. Powers relating to the Land may be released - 282
5. Powers appendant barred by Feoffment - - id.
7. And by Bargain and Sale - - - - id.
9. May be suspended or charged - - - 283
11. A Power to lease not barred by a Charge - - id.
13. Powers in Gross not barred by a Conveyance of the Land. - - - - - 285
15. Unless the Estate is devested - - - 286
18. Collateral Powers not barred by any Conveyance - 287
22. A Power may be forfeited to the Crown - - 288
23. In what Cases it may be executed - - - id.
28. A Power may be merged - - - - 290
30. Where there is no Object of a Power it becomes void 291

CHAP. XIX.

Of the Construction of Deeds.

1. General Rules - - - - - 292
23. Words sometimes rejected - - - 296
25. Omissions supplied - - - - 297
27. Settlements rectified - - - - id.
29. Where a Deed is uncertain it is void - - 298
31. Some Operation is always given to a Deed - - id.
40. Where the Grantee has an Election how to take 301
43. No Averments admitted against Deeds - - 303
47. But admitted in support of them - - - 305
51. And where there is an Ambiguity - - - 306
54. And where there is Fraud or Mistake - - 307
55. Where a Deed operates as an Estoppel - - id.
61. Construction of Conveyances to Uses - - 308
65. Of Declarations of Trust - - - 310
67. Of Articles of Agreement - - - - 311

CHAP. XX.

Construction—Of the formal Parts of a Deed.

		Page
2.	Date	312
7.	Parties	313
10.	How to be described	314
23.	Recital	317
28.	Consideration	318
29.	Grant or Release	id.
33.	Description of the Things granted	319
58.	Effect of Additions to the Description	324
65.	Clause respecting Deeds	327
67.	Exception	id.
69.	Habendum	328
77.	Void when repugnant to the Premises	329
82.	But may abridge or qualify and enlarge them	331
88.	Sometimes not controlled by the Premises	id.
91.	Words of Limitation and Purchase	332

CHAP. XXI.

Construction—By what Words different Estates may be created.

1.	What Words create an Estate in Fee	334
12.	What Words create an Estate Tail	337
13.	What Words restrain the Word Heirs	id.
25.	Limitation to A. and his Heirs, with a Remainder over	340
29.	Limitation to a Man and his Wife, and the Heirs of their Bodies	341
33.	Distinction between Heirs of the Body, and upon or on the Body	342
36.	Effect of a Limitation to the Heirs of the Body of A.	344
40.	Usual Mode of limiting Estates Tail	345
42.	What Words create an Estate for Life	348
44.	What Words create an Estate for Years or at Will	id.
46.	What Words create a Joint Tenancy	id.
52.	What Words create a Tenancy in Common	354
61.	What Words create Cross Remainders	362
67.	Cases of Marriage Articles	366

CHAP. XXII.

Construction—Of the Rule in Shelley's Case.

	Page
1. Origin and Nature of the Rule	369
11. How mediate Limitations are vested	373
13. Of Joint and several Limitations	374
19. Both Estates must be by the same Instrument	376
25. And be of the same Nature	379
28. The Rule not extended to the Words Son, Child, &c.	id.
29. Nor to the word Heir in the singular Number	380
32. Nor to Marriage Articles	id.
49. Settlements in pursuance of Articles rectified	395
54. Except in the case of Purchasers	397
56. The Rule not formerly applied in cases of Terms for Years	398
60. But is now applied	400
63. Unless a contrary Intent appears	401

CHAP. XXIII.

Construction—Of Perpetuities.

1. Perpetuities discouraged	403
7. History of Settlements	406
11. Settlements of Estates for Life	408
12. Of Terms for Years	id.
18. Alienation may be restrained during Lives in being, and 21 Years after	414
21. This Rule applied to springing and shifting Uses	415
25. And to Uses arising from Appointments	417
28. And to Declarations of Trust of Terms	422
29. But not to Remainders after Estates Tail	id.
31. An unborn Person may be made Tenant for Life	id.
33. And a vested Remainder limited on that Estate	423
34. But no Estate can be limited to the Issue of an unborn Person	id.
35. Perpetuities created by Act of Parliament	424

CHAP. XXIV.

Construction—Of the Reddendum, Condition, and Warranty.

1. Of the Reddendum	426
2. Condition—By what Words created	id.

Page

12. Warranty - - - - - 430
13. Express Warranty - - - - id.
17. Implied Warranty - - - - 431
25. Lineal Warranty - - - - 435
28. Only binds the Heir where he has Assets - - 436
35. Statute of Gloucester - - - - 438
36. Statute *De Donis* - - - - 439
37. Does not extend to collateral Warranty - - id.
39. Which bars all Remainders - - - 440
42. But not the Reversion - - - - 441
44. Statute 11 Hen. VII. c. 20. - - - 444
45. Statute 4 Ann. c. 16. - - - id.
47. How Warranties may be destroyed - - - id.

CHAP. XXV.

Construction—Of Covenants.

1. Nature of - - - - - 446
5. No Technical Words necessary - - 447
13. Implied Covenants - - - - 449
16. Qualified by express ones - - - id.
18. Joint and several Covenants - - - 450
22. Of Covenants Real - - - - 451
26. Extend to all claiming under the Grantee - - 453
34. Exception—Undertenants - - - 455
38. The Assignor is still liable - - - 457
40. Descend to the Heirs of the Grantors - - id.
41. And go to the Grantees of the Reversion - - id.
44. General and specific Covenants - - 459
46. Usual Covenants for the Title - - - id.
47. That the Grantor is seised in Fee, &c. - - id.
51. For Quiet Enjoyment - - - 460
60. Free from Incumbrances - - - 463
68. For further Assurance - - - 464
71. Are now usually restrained - - - 466
75. According to the Title of the Vendor - - 468
79. Who are held to claim under the Vendor - - 471
85. Who are bound to covenant for the Title - - 474
89. Remedies under these Covenants - - - 476
98. Covenants in Assignments of Leaseholds - - 480

Page
100. Covenants for Production of Title Deeds - - 480
101. Covenants for Renewal of Leases - - - id.

CHAP. XXVI.

How Deeds may be avoided.

1. Disclaimer or Disagreement - - - 494
6. Duress - - - - - 495
8. Erasure or Interlineation - - - id.
12. Breaking off the Seal - - - - 496
14. Cancelling - - - - 497
19. Averment of Usury - - - 498
23. Equity avoids Deeds obtained by Fraud - - 499
34. Or made in Derogation of the Rights of Marriage 502
44. Or for an immoral Consideration - - - 506
54. All Deeds are void as to Crown Debts - - 510
61. The Crown entitled to a Term attendant - - 513

CHAP. XXVII.

What Deeds are void as to Creditors and Purchasers.

1. Statutes in Favour of Creditors and Purchasers 515
3. What Deeds are void by these Statutes - - 516
4. Deeds made with an Intent to defraud Creditors - id.
9. Or to defraud Purchasers - - - 517
12. Notice is immaterial - - - - 518
15. Voluntary Conveyances void against Creditors - 519
18. Except where the Grantor is not indebted at the Time id.
23. Voluntary Conveyances void against Purchasers - 520
28. Though with Notice - - - - 522
31. And Conveyances with Power of Revocation - 525
39. Who are deemed Purchasers - - - 527
45. Voluntary Conveyances binding on the Parties - 529
48. And good as to subsequent voluntary Deeds - id.
51. And also as to Wills - - - 530
54. Proviso in Favour of Deeds made on good Consideration - - - - - 531
57. Settlements before Marriage - - - 532
67. How far the Consideration of Marriage extends - 534
72. Settlement by a Widow on her Children - - 536

CHAP. XXVIII.

Of registering and enrolling Deeds.

		Page
2.	Register Acts	538
12.	An Appointment must be registered	542
14.	Registering an Assignment is not a Register of the Lease	543
16.	Registering is not Notice	544
20	Notice takes away the Effect of Registering	547
25.	The Notice must be fully proved	556
28.	Utility of the Register Acts	558
30.	Register of Annuities	559
31.	Register of the Bedford Level	id.
32.	Enrolment of Deeds	560

A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

TITLE XXXII.

DEED.

CHAP. I.

Of the Origin and Nature of Deeds.

CHAP. II.

Of the Circumstances necessary to a Deed.

CHAP. III.

Of the Statute of Frauds and Perjuries.

CHAP. IV.

Of a Feoffment, Gift, and Grant.

CHAP. V.

Of a Lease.

CHAP. VI.

Of an Exchange, Partition, Release, and Confirmation.

CHAP. VII.

Of a Surrender, Assignment, and Defeazance.

CHAP. VIII.
Of a Bond and Recognizance.

CHAP. IX.
Of a Bargain and Sale.

CHAP. X.
Of a Covenant to stand seised.

CHAP. XI.
Of a Lease and Release.

CHAP. XII.
Of a Declaration of Uses.

CHAP. XIII.
Of Powers of Revocation and Appointment.

CHAP. XIV.
Of Powers to jointure.

CHAP. XV.
Of Powers to lease.

CHAP. XVI.
Of the Execution of Powers.

CHAP. XVII.
Where Equity will support a defective Execution.

CHAP. XVIII.
How Powers are extinguished and destroyed.

CHAP. XIX.
Of the Construction of Deeds.

CHAP. XX.

Construction—of the formal Parts of a Deed.

CHAP. XXI.

Construction—by what words different Estates may be created.

CHAP. XXII.

Construction—of the Rule in Shelley's Case.

CHAP. XXIII.

Construction—of Perpetuities.

CHAP. XXIV.

Construction—of the Reddendum, Condition, and Warranty.

CHAP. XXV.

Construction—of Covenants.

CHAP. XXVI.

How Deeds may be avoided.

CHAP. XXVII.

What Deeds are void as to Creditors and Purchasers.

CHAP. XXVIII.

Of registering and enrolling Deeds.

CHAP. I.

Of the Origin and Nature of Deeds.

1. *Alienation of Lands.*
7. *Subinfeudation.*
14. *Fines for Alienation.*
18. *Different Kinds of Assurances.*
19. *Of a Deed.*
23. *Deed Poll.*
24. *Indenture.*
29. *A Deed transfers the Estate without the Assent of the Grantee.*
31. *Article of Agreement.*

Section 1.

Alienation of Lands.

THE third mode of acquiring an estate by purchase, is alienation; under which is comprised every method whereby estates are voluntarily resigned by one person, and accepted by another. Lord Coke says, the word alienation is derived from *alienare*, id est, *alienum facere; vel ex nostro dominio in alienum transferre, sive rem aliquam in dominium alterius transferre.*

1 Inst. 118 b.

2. It is admitted by all our legal writers, that an unlimited power of alienation existed in England in the time of the Saxons: that upon the settlement of the Normans, and the establishment of the feudal law, all lands became unalienable; and that, during the reigns of William I. and his sons, the doctrine of non-alienation was, for various reasons, strictly enforced.

Wright, 154.

3. The greater part of the real property of the kingdom had been distributed among the Norman barons, as strict and proper feuds; upon condition of military service. And as a considerable jealousy prevailed against all those who were of Saxon origin, lest they should attempt to reinstate themselves in their ancient possessions; great care was taken during that period, that all the vassals of the crown, who could alone be depended on, in case of any insurrection, should be in a situation to perform their military services.

Dissert. c. 2. § 1.

4. The first step towards a liberty of alienation, was that by which the tenant was permitted to aliene, with the consent of his lord. This rule was adopted from the maxims which then prevailed on the Continent, and gave rise to fines for alienation. But in England the tenant could not dispose of his land,

even with the consent of his lord, unless he had also obtained the consent of his next heir: it was therefore very common, in ancient feoffments, to express that the alienation was made, with the consent of the feoffor's heir. Glanv. Lib. 7. c. 1. Mad. Form. N° 316. Wright, 167.

5. The power of alienation was farther extended by a law of Hen. I. c. 70., which allowed a man to dispose of lands purchased by himself. *Emptiones vero, vel deinceps acquisitiones suas det cui magis velit. Si Bockland habeat, quam ei parentes sui dederunt, non mittat eum extra cognationem suam.*

6. Glanville has given us a very circumstantial account of the law, as it stood in the reign of Hen. II., respecting alienation; from which it appears that the power of disposing of lands was then considerably enlarged; and a right of alienation seems to have been soon after extended to all lands which a person had himself acquired, provided they had been conveyed to him and his assigns; and also to a fourth part of all lands acquired by descent; without the consent of the heir. Lib. 7. c. 1.

7. There was also a particular mode of alienation, which appears to have been always allowed; and in the feudal law is called subinfeudation:—Where the proprietor of a feud granted a proportion of it, to be held of himself. The king's chief tenants adopted this practice, immediately after the Conquest, in order that they might be able to perform their renders; for most of them held their lands by the service of several knights. Subinfeudation. Dissert. c. 2. § 14.

8. Thus it appears from the Black Book of the Exchequer, published by Hearne, that in the reign of Henry II. the king's tenants had created a vast number of knights fees, to be held of themselves.

9. The practice of subinfeudation produced a grievance, much complained of in those days. The persons who held of the king's chief tenants began to grant to others still more minute estates, to be held of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed, that by this method they lost all their feudal profits; which fell into the hands of these mesne or middle lords. Besides, these mesne lords were by this means less able to perform their military services.

10. This caused an article to be inserted in *magna charta*, prohibiting subinfeudation, unless sufficient was left to answer the services due to the superior lord. *Nullus liber homo det de cetero amplius alicui, vel vendat alicui de terra sua, quam ut de residuo terræ suæ possit sufficienter fieri domino feodi servitium ei debitum, quod pertinet ad feodum illud.*

1 Inst. 43.
2 —— 65.

11. The inconveniences which followed from the practice of subinfeudation, produced the statute of *quia emptores terrarum*; which, reciting the losses sustained by the great lords, enacted—*Quod de cetero liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere: ita tamen quod feoffatus teneat terram illam seu tenementum illud de capitali domino feodi illius, per eadem servitia et consuetudines, per quæ feoffator suus illa prius tenuit.*

2 Inst. 66. 500.

Ten. 161.

12. Sir Martin Wright observes, that this statute took from the tenants of common lords the feudal liberty they claimed, of disposing of part of their lands, to hold of themselves: and instead of it, gave them a general liberty to sell all, or any part, to hold of the next immediate lord; which they could not have done before, without consent.

13. Neither *magna charta*, nor the statute of *quia emptores*, extended to the king's immediate tenants; who seem to have been so strictly restrained from alienation, that they were not permitted to dispose of their lands even to their eldest sons. Thus it appears from the Rolls of Parliament, that in 18 Edw. I. Gilbert de Humfraville petitioned the king for licence to enfeoff his eldest son, and his wife, of the manor of Overton; to hold of the said Gilbert during his life, and after his death, of the chief lord, by the usual services; to which the king answered *Rex non vult aliquem medium, et ideo non concessit.* Vol. 1. 54. Fitz. N. B. 175.

14. This restraint upon the king's immediate tenants is supposed to have been indirectly removed by the statute *de prerogativa regis*; by which it was declared, that no person who held of the king *in capite*, by military service, should alien the greater part of the land, so that the remainder were not sufficient to answer his services, without the king's licence. In consequence of this law, the king's consent was necessary to every alienation of his tenants *in capite*; and it became a question, whether if such tenant aliened without licence, the land was not forfeited; or whether the king should only seize it by way of distress, till a fine should be paid for the contempt. This was settled by the statute 1 Edw. III. c. 12., by which it was enacted, that in all cases of alienations by tenants *in capite*, the king should not hold the land as forfeited, but should have a reasonable fine in the Chancery. Fines for Alienation. 17 Edw. 2. c. 6. Wright, 162. Idem. 165.

15. It remained much longer a doubt whether the king's tenants might have aliened any part of their lands, to hold of themselves; as the tenants of inferior lords might, before the statute of *quia emptores*. But such alienations made by tenants who held of Idem, 166.

King Hen. III. or other kings before him, were at length made good by the statute 34 Edw. III. c. 15.; saving to the king his prerogative of the time of his grandfather, and of his own time.

Ten. 166. 16. Sir Martin Wright observes, that it is extremely doubtful what prerogative was here saved to the Crown, but it is perfectly clear that fines for alienation were established by the statute 1 Edw. III.: and after this act, Lord Coke says, writs of *quo titulo ingressus est*, issued from the Exchequer, to help the king to his reasonable fine; whereupon the feoffee was driven to plead, to his great charge and trouble. It was therefore, upon conference with the king's officers and the judges, ordained, seeing the king's tenants could not aliene, without licence, for if they did they should pay a fine; that for a licence to be obtained, the king should have a third part of the annual value of the land, which was holden reasonable: if the alienation was without licence, then a reasonable fine, by the statute, was to be paid by the alienee; which they resolved to be one year's value.

2 Inst. 67.

17. Thus continued the law till the abolition of military tenures by the statute 12 Cha. II. c. 24, which takes away all fines for alienations, seizures, and pardons for alienations, and all charges incident thereunto; saving fines for alienation due by the customs of particular manors and places; so that all freehold estates became thereby alienable without licence or fine.

Different Kinds of Assurances. 18. With respect to the different modes of alienation, or rather the legal evidences of the transmission of real property, they are called the common assurances of the realm, whereby every man's estate is assured to him; and all controversies, doubts, and difficulties are either prevented or removed.

Of these there are four kinds: 1. Deeds or matters in *pais*, which are assurances transacted between two or more private persons, in the country; that is, according to the old law, upon the very spot or piece of land to be transferred. 2. Matters of record, or assurances transacted only in the King's public courts of record. 3. Assurances deriving their effect from special custom, obtaining in some particular places; and relating only to some particular species of property. 4. A devise contained in a person's last will and testament, which does not take effect till after his death.

Of a Deed.

19. A deed is a writing on parchment or paper, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things therein contained. It is sometimes called a charter, *charta*, from its materials; but most usually, when applied to the transactions of private persons, it is called a deed; in Latin, *factum*; because it is the most solemn and authentic act that a man can perform, in the disposal of his property.

1 Inst. 35 *b*. Touch. 50.

20. It is probable that every alienation of land was very soon accompanied with some written evidence; though, in the time of the Saxons, a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Thus, Ingulphus in his History of the Abbey of Croyland, says—*Conferebantur multa prædia nudo verbo, absque scripto vel charta; tantum cum domini gladio, galea, vel cornu, vel cratera; et plurima tenementa cum calcari, cum strigili, cum arcu; et nonulla cum sagitta.* Deeds or charters were notwithstanding in use at that time. These were generally called *gewrite* or writings; the particular deed, by which a free estate might be conveyed, was called *landboc, libellus de terra*, a do-

Madox Formull. 283.

nation or grant of land; and the land thus granted was called *bockland*.

21. Upon the introduction of the Norman customs, the solemn and public delivery of the possession, in imitation of the feudal investiture, became essentially necessary to the transfer of land; and was alone sufficient for that purpose. But as written charters constituted a much better species of evidence of the agreement; a charter or deed, in imitation of the *breve testatum* of the feudal law, was usually prepared and executed, and delivered to the purchaser, at the same time with the land.

Dissert. c. 1. § 45.

22. The increase of commerce and wealth having introduced a greater degree of refinement of manners, agreements and conveyances became more complex, which produced an universal practice of reducing them into writing: but still lands might have been transferred by a verbal contract only, provided it was attended with a solemn and public delivery of the possession, till the latter end of the reign of King Charles II.

Deed Poll. Lit. § 370. 2.

23. Deeds are divided into two sorts; deeds poll, or cut in a straight line; and deeds indented. A deed poll is not, strictly speaking, an agreement between two persons; but a declaration of some one particular person, respecting an agreement made by him with some other person. Thus, a feoffment from A. to B. by deed poll, is not an agreement between A. and B., but rather a declaration by A. addressed to all mankind, informing them that he thereby gives and enfeoffs B. of certain lands therein described. It was formerly called *charta de una parte*, and usually began thus, *Sciant præsentes et futuri quod ego*, A. &c.; and now begins in these words, Know all men by these presents that I, A. B. have given, granted, and

enfeoffed, and by these presents do give, grant, and enfeoff, &c.

24. An indenture is a mutual agreement between two or more persons, whereof each party has usually a copy. Formerly, when deeds were more concise than they are at present, it was usual to write both parts on the same skin of parchment, with some words or letters of the alphabet written between them, through which the parchment was cut in acute angles, *instar dentium*, from which they acquired the name of indentures, or deeds indented, in such a manner as to leave half the word on one part, and half on the other. Indenture, Lit. 370.

25. Lord Coke says, to constitute an indenture it is absolutely necessary that the paper or parchment, on which the deed is written, be cut *instar dentium* on the top or side. And in Stile's case, where a deed was produced as an indenture, which was not indented, beginning with the words *hæc indentura*, it was adjudged that it was not an indenture, although it was in two parts, for the words of a deed cannot make it indented; but to the making of an indenture there ought to be a manual act of indenting the parchment or paper. 1 Inst. 143 *b*. 229 *a*. 5 Rep. 20.

26. The practice has long been to cut the first skin of parchment on which an indenture is written in an undulating line. And it is said by Sir H. Gwillim, that if only the form of indenting the parchment or paper be wanting, this is not material; for it might even be done in court. No exception is therefore now taken on such a trifling omission. 4 Bac. Ab. 51.

27. In the case of an indenture, there ought regularly to be as many copies of it, as there are parties: and when the several parts are interchangeably executed by the several parties, that part or copy which

is executed by the grantor, is usually called the original, and the rest are counterparts. Though of late it is most frequent for all the parties to execute every part, which renders them all originals. But a counterpart of a deed has been admitted to be sufficient evidence of such deed: and a conveyance decreed accordingly.

Eyton v. Eyton, Prec. in Cha. 116.

Finch's Law, 109.

28. If there happens to be any variance between the indenture and counterpart, it shall be taken as the deed of the grantor is, and the other shall be intended only the misprision of the writer.

A Deed transfers the Estate without the Assent of the Grantee.

Gorton's Case, infra, c. 12.

29. All deeds, whether deriving their effect from the common law, or the statute of uses, do, immediately upon their execution by the grantors, devest estate out of them, and put it in the party to whom the conveyance is made, though in his absence, and without his notice, till some disagreement to such estate appears.

Thompson v. Leach, 2 Vent. 201. 3 Mod. 296.

30. This doctrine is founded on the principle, that the assent of the party who takes, is implied in all conveyances; 1. Because there is a strong intendment in law, that it is for a person's benefit to take: and no man can be supposed to be unwilling to that which is for his advantage. 2. Because it would seem incongruous and absurd, that when a conveyance is completely executed on the grantor's part, the estate should continue in him. 3. But the principal reason why the law will not suffer the operation of a conveyance to be in suspence, and to expect the agreement of the party to whom it was made, is to prevent the uncertainty of the freehold.

Article of Agreement.

31. It is a common practice for persons to enter into an article of agreement, preparatory to the execution of a formal deed, whereby it is stipulated that one of the parties shall convey to the other certain

lands, or release his right to them, or execute some other disposition of them. An article is therefore considered as a memorandum or minute of an agreement to make some future disposition or modification of real property; and such an instrument will create a trust or equitable estate, of which a specific performance will be decreed in Chancery. Tit. 12. c. 1.

32. Articles are usually entered into for the purchase and sale of lands; for the taking and granting of leases; for making mortgages, and settlements on marriage.

TITLE XXXII.

DEED.

CHAP. II.

Of the Circumstances necessary to a Deed.

2. 1° *Sufficient Parties.*
6. *Who may convey by Deed.*
8. *The Queen.*
9. *Corporations.*
11. *Infants.*
15. *Marriage Contracts by Female Infants.*
22. *By Male Infants.*
24. *Infant Trustees may convey.*
26. *Idiots and Lunatics.*
29. *Married Women.*
36. *Persons attainted.*
37. *Who may be Grantees.*
43. *Conveyances to charitable Uses.*
46. 2° *Consideration.*
53. *Different Kinds of.*
57. 3° *Writing.*
60. *A proper Stamp.*
61. 4° *Sufficient Words.*
63. *Formal Parts.*
72. 5° *Reading if required.*
73. 6° *Sealing and Signing.*
80. 7° *Delivery.*
87. *Delivery as an Escrow.*
93. 8° *Attestation by Witnesses.*

Section 1.

WHEN it became usual to reduce all agreements into writing, the following circumstances were deemed necessary to a deed: 1. Sufficient parties and a proper subject-matter. 2. A good and sufficient consideration. 3. Writing on paper or parchment duly stamped. 4. Words sufficient to specify the agreement, and bind the parties, legally and orderly set forth. 5. Reading, if desired. 6. Sealing and signing. 7. Delivery. 8. Attestation by witnesses.

1° Sufficient Parties.

2. The first requisite to a valid deed is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a

thing or subject-matter to be contracted for. So that in every deed there must necessarily be a grantor, a grantee, and a thing granted.

3. All those who have any estate, right, title, or interest whatever, either at law or in equity, in that which is the subject-matter of a deed, must necessarily be parties to it, otherwise their estates or interests will remain in them. And all those who are intended to take an immediate interest under a deed indented, must also be parties to it, by sealing it. But a person may take an estate in remainder, by a deed to which he is not a party. And when the person to whom a remainder is limited, enters on the land, he then becomes bound to perform the conditions contained *in* the deed.

1 Inst. 231 *a*. 2 —— 673. Vin. Ab. Faits, C. *a*. 1 Inst. 230 *b*. 231 *a*.

4. In a deed poll, the person to whom the estate is granted, becomes in fact a party to it. Thus if A. by deed poll agrees to pay a sum of money to B., B. shall maintain an action upon it, though he be a stranger, and did not seal it.

Com. Dig. Fait, D. 1.

5. A power of attorney may be given in a deed poll to a stranger, to make livery of seisin. Though it was formerly held, that such a power could, in an indenture, be only given to one of the parties to it.

1 Inst. 52 *b*.

6. With respect to the persons who are capable of conveying by deed, it may be laid down as a general rule, that all those who have attained the age of 21 years, are of sound mind and understanding, and not under the power of others, may be parties to, and bind themselves by deed.

Who may convey by Deed.

7. Persons who are blind, deaf, or dumb, or who are both deaf and dumb, may convey by deed; if it appear that, notwithstanding those disabilities, they are capable of comprehending the nature and con-

Perk. § 25

sequences of a deed, and can express their meaning by writing or signs.

The Queen, Tit. 34.

8. The king can only grant and take by matter of record; but a queen consort is considered by the common law as a feme sole: she may therefore be party to any species of deed, without the king. By the statute 39 & 40 Geo. III. c. 88. § 8. a queen consort is enabled, during the joint lives of the king and such queen, by deed under her hand and seal, to grant, convey, alien, and dispose of any manors, &c. which shall be purchased by, or in trust for her; or which shall come to, or devolve upon, or vest in her, or any person or persons in trust for her, for any estate of inheritance or freehold, as fully and effectually as if she were sole and unmarried. By the ninth section the like power is given to all future queens, with a proviso that this act shall not enable any queen consort to dispose of any palace belonging to the king, in right of the Crown, vested in her for life: or to make any grant but such as she might make if sole.

Corporations.

9. A corporation sole, as a bishop or parson, may be a party to a deed; and although a corporation aggregate is said to be invisible, immortal, and to exist only in supposition of law, yet such an artificial body is capable, by its creation, of being party to a deed; and, in many cases, of acquiring or conveying away real property by deed. But a dean without his chapter, a mayor without his commonalty, or the master of a college without his fellows, cannot, by executing a deed, bind the corporation.

1 Inst. 94 *b*.

10 Rep. 30 *b*. 1 Sid. 162. 1 Ves. & B. 226.

10. All lay civil corporations may alien their lands as freely as individuals; but ecclesiastical and eleemosynary corporations are restrained by statute 1 Eliz. c. 19. and 13 Eliz. c. 10. from every mode of aliena-

tion, except that of leasing. In the exercise of this power, they are placed under considerable restrictions by the legislature, of which an account will be given hereafter. Incumbents of livings are however permitted and enabled, by the statute, 17 Geo. III. c. 53. and 21 Geo. III. c. 66. to raise money by mortgage for repairing or building houses. Ch. 5.

11. By the statute 55 Geo. III. c. 147, every parson, vicar, or other incumbent of any ecclesiastical benefice, is enabled to exchange parsonage houses and glebe lands, with the consent of the patron and bishop, for other houses and lands; and also to purchase lands to be annexed to such benefices as glebe land thereof; and by mortgage of their tithes, rents, and other profits, to raise money for such purchases.

12. All agreements and deeds made by infants, from which no apparent benefit can arise to them, are either absolutely void or voidable; that is, the law allows the infant, when he comes of age, either to ratify and confirm, or else to avoid them. And where it is held that the deeds of infants are not void, but voidable, the meaning is, that *non est factum* cannot be pleaded; because they have the form, though not the operation of deeds: they are not therefore void on that account, without showing some special matter to render them so. Infants. 3 Mod. 310.

13. Whatever an infant is bound and compellable to do at law, the same shall bind him although he does it without suit: Therefore where an infant reconveyed lands, which had been mortgaged to his father, the mortgage money having been paid off, the conveyance was held good.

14. A person conveyed the lands in question to W. Cooke and his heirs, by way of mortgage: Cooke afterwards died, leaving J. L. Cooke, an infant, his Zouch v. Parsons, 3 Burr. 1794.

heir: the mortgage money was paid off, and the infant joined with his father's executor in conveying the mortgaged premises to a new mortgagee. It was resolved by the Court of King's Bench, that the infant was bound by this conveyance, because it could never operate to his prejudice, and he was compellable to convey.

15. By the statute 17 Geo. III. c. 26. it is enacted, that all contracts for the purchase of any annuity, with an infant, shall be utterly void; any attempt to confirm the same, after such person shall have attained the age of 21 years, notwithstanding.

Marriage Contracts by Female Infants.

16. Contracts entered into by female infants, in consideration of marriage, are more favoured than others. A female being capable of contracting marriage long before the age of twenty-one, she ought to be permitted to bind herself by the other parts of the contract; for as soon as the marriage is had, the principal contract is executed, and cannot be set aside; the estate and capacities of the parties are altered; the children born of the marriage become interested. It has therefore been truly observed, that marriage contracts ought not to be hastily rescinded, because the interests of third persons would be affected.

Cannell v. Buckle, 2 P. Wms. 243.

17. Lord Macclesfield has said, that if a female infant, on a marriage, with the consent of her guardians, should covenant, in consideration of a settlement, to convey an inheritance to her husband; if this were done in consideration of a competent settlement, equity would execute the agreement, although no action would lie at law to recover damages.

Harvey v. Ashley, 3 Atk. 615.

Lord Hardwicke, after citing this passage, says —"This is going a great way, as it related to the inheritance of the wife; but yet there are cases where

the Court will do it: as if the lands of the wife were no more than an adequate consideration for the settlement that the husband makes; and after the marriage the wife should die and leave issue, who would be entitled to portions, provided for them by the settlement; it would in that case be very reasonable to affirm that settlement."

18. In a case where a bill was filed for a specific execution of articles, entered into by a female infant, respecting her real estate, previous to and in consideration of marriage, Lord Thurlow is reported to have said—"To decree a specific performance of the articles, the Court must carry the principle to this length, that a wife making a wise settlement in her *infancy*, on the marriage, without any estate settled on the other side, is bound by the agreement; and that even if the husband had died, she must have been bound. I cannot think an infant, only covenanting as to her estate, can be bound. If she is so at all, it must be by reference to her marriage. Nobody has yet said that merely by its being upon marriage, she is bound; but it is said that upon a competent settlement, she would be bound. I think the Court should not go into the competence of the settlement. I must lay down, that every settlement shall be considered as good, till shown to be fraudulent. The cases have not gone so far, nor does my opinion. If she had a settlement from her husband, and after his death, she had taken possession of it, I think she would be bound by the equity arising from her own act. I say this in deference to Cannel v. Buckle, and Harvey v. Ashley. I think she is not bound, unless she has availed herself of the settlement of the husband. In this opinion, I cannot

Durnford v. Lane, 1 Bro. R. 106.

ante, § 17.

say the whole property is bound, or decree the articles to be specifically performed."

19. Lord Thurlow adhered to this opinion in the following case.

Clough v. Clough, 3 Woodison, 453. 4 Brq. R. 510.

A bill was brought on behalf of the infant children of the marriage, after the husband's death, against his widow; praying that marriage articles might be established and specifically performed, entered into before marriage by Patty Clough the widow, while an infant, and her guardian, for settling her estate, and lands of her husband, as therein mentioned. She, by her answer, insisted that she had done nothing after her full age to affirm the articles, therefore that her estates were not thereby bound; waiving any right under the same in the lands of her late husband. The decree declared that her estate was not bound by the marriage articles; and the bill was dismissed without costs.

May v. Hook, Tit. 18. c. 2. § 18.

20. It follows that a deed executed by a female infant, though in consideration of marriage, does not bind her, unless she assents to it after the death of her husband. The acceptance of a jointure may at first sight appear to form an exception to this rule. But it has been shown that a woman is not barred of dower by a jointure in consequence of any agreement of her's; but by force of the statute.

Tit. 7. c. 1. § 38.

3 Atk. 613.

21. Lord Hardwicke has said that a female infant may enter into an agreement before marriage respecting her personal estate, which will bind her: for such agreement must be in some way beneficial to her, as otherwise her husband would be entitled to it.

Vide 1 Bro. R. 111.

By Male Infants.

22. Though a male infant cannot in general affect his estate by any deed executed by him in conside-

ration of marriage * ; yet where a male infant married an adult female, who covenanted that her estate should be limited to certain uses, he was held to be bound by such covenant.

23. A male infant married an adult female, who covenanted that her estate should be settled to certain uses. Upon a bill filed by the trustees of the settlement, to have it carried into execution by the husband and wife, the husband insisted that, being an infant when he executed the settlement, he was not bound by it. Lord Thurlow said, if a woman before marriage conveys her property, and agrees to settle her general expectations, when they shall fall in, and this be done without any fraud upon the intended husband, such an agreement must be executed; and the husband, when of age, must answer for her contract. It was not therefore necessary to discuss the other question, how far the infant husband could be bound by his own contract; for he went upon the covenant of the wife, who was adult. The husband's covenant operated no more than to show his concurrence, and to take away every imputation of fraud from the transaction. Slocomb v. Glubb, 2 Bro. R. 545.

24. By the statute 7 Ann. c. 19. it is enacted, that all infant trustees and mortgagees shall be compellable to make such conveyances and assurances as the Court of Chancery or Exchequer shall direct; which shall be as good and effectual in law, as if the said infants were of full age. But in such cases the necessary costs of the infant will be allowed by the Court. Infant Trustees may convey. 10 Ves. 554.

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* Vide Hollingshead v. Hollingshead, cited 2 P. Wms. 229. Where a covenant by a male infant, to execute a power of appointing a jointure, was held good.

Att. Gen. v. Pomfret, 2 Cox, 221. Id. — 422.

25. It is now settled, that this act only extends to cases where infants are bare trustees for the *cestui que trust*, and bound to convey to them; not to cases where there are any particular trusts to be executed.

Idiots and Lunatics. 1 Inst. 247 *a*.

26. It was formerly held, that neither an idiot nor lunatic could avoid his own deed. It is however now settled, that idiots are incapable of binding themselves by deed; and also lunatics, unless they agree to such deed upon recovering their understanding; that the heir of an idiot or lunatic may avoid a deed executed by him, by pleading his disability. But if an idiot or lunatic makes a feoffment, and delivers seisin in person, it is not absolutely void, but only voidable.

Thompson v. Leach, Tit. 16. c. 6. infra, c. 4.

27. By the statute 4 Geo. II. c. 10., idiots, lunatics, and generally all persons who are *non compos mentis*, or their committees, being trustees or mortgagees, are compellable to convey, under the direction of the Court of Chancery, the estates of which they are seised as trustees or mortgagees only; and all such conveyances are declared to be good and valid.

28. By the statute 48 Geo. III. c. 75. § 1. the Courts of Chancery of England and Ireland are enabled to order the freehold and leasehold estates of lunatics to be sold, or charged and incumbered by way of mortgage, or otherwise, for the purpose of raising such sums of money as shall be necessary for payment of the debts, and for performing the engagements of such persons; and to order the committee or committees of the estate of such persons respectively, to execute proper conveyances of such estate.

Married Women. 1 Inst. 42 *b*. *n*. 4.

29. All deeds executed by married women, except a queen consort, for the purpose of conveying their estates, are absolutely void at law, not merely voidable. Deeds of this kind are also void in equity.

And no act of the wife, after the death of her husband, except in the case of a lease, will in general operate as a confirmation of them. infra, c. 5.

30. A husband and wife made a mortgage of a share in the New River, which was the estate of the wife, by a demise for 1,000 years, by deed. Upon the death of the husband, the wife received the profits, and paid the interest of the mortgage. But she was held not to be bound. Drybutter v. Bartholomew, 2 P. Wms. 127.

31. The acknowledgement of a deed executed by a woman during her marriage, after the death of her husband, may however, in some cases, amount to a redelivery of it, and so render it valid.

32. A man and his wife being entitled to the reversion of a house, in right of the wife, by deed executed by the husband and wife, conveyed it to a person, by way of mortgage. After the death of the husband, the wife, by three different papers under her hand, acknowledged the mortgage. It was held by the Court of K. B. that these papers were equivalent to a redelivery of the deed. Goodright v. Straphan, Cowp. 201.

33. By the custom of London, and of several other cities, a married woman may bind herself by a deed enrolled; being privately examined. This custom was confirmed in the reign of Henry VIII. by a positive statute. Hob. 225. 34, 35 H. 8. c. 22.

34. A married woman may execute a naked authority, and a power to convey lands is now frequently given to a married woman, by means of a conveyance to uses. Vide infra. c. 13.

35. If a husband abjures the realm, or is banished, he is thereby become *civiliter mortuus;* his wife is considered as a feme sole; and may act in all things as if her husband was naturally dead. 1 Inst. 132 b. 2 Vern. 104. 3 P. Wms. 37.

Persons attainted.

36. Persons attainted of treason, felony, or *præmunire*, are incapable of conveying away their estates, by deed, or otherwise, from the time when the of-

1 Inst. 390 *b.*

fence was committed. For any conveyance by them subsequent to that event, would tend to defeat the king of his forfeiture, and the lord of his escheat.

Who may be Grantees.

37. By the common law all persons whatever may be grantees in a deed, because it is supposed to be

1 Inst. 2.

for their benefit. Thus, Lord Coke says, an infant may purchase, and at his full age, he may either agree thereunto, and perfect it; or without any cause to be alleged waive, or disagree to the purchase. So may his heir after him, if he agreed not thereto after his full age.

Idem.

38. A man of nonsane memory may also, without the consent of any other, purchase lands; nor can he himself waive it. If he die in his madness, or after his memory recover, without agreement thereunto, his heir may waive it, without any cause showed. So of an idiot. But if the man of nonsane memory recover his memory, and agree, it is unavoidable.

Idem.

39. An alien may be grantee in a deed, though he cannot hold the land; for upon office found the king shall have it by his prerogative. If an alien be made a denizen, he then becomes capable of holding

Golds. 29.

lands purchased after his denization. But it seems, that if an alien purchases land, and before office found the king makes him a denizen and confirms his estate, the confirmation will be good.

1 Inst. 2 *b.*

40. If a man commits felony, afterwards purchases lands, and after is attainted, he had capacity to purchase, but not to hold it; for the lord of the fee shall have it by escheat. If a man be at-

tainted of felony, yet he hath capacity to purchase to him and his heirs; but he cannot hold it, for in that case the king shall have it by his prerogative, and not the lord of the fee, because a man attainted has no capacity to purchase; being *civiliter mortuus*, except for the benefit of the king.

Pimb's Case, Tit. 11. c. 3.

41. A married woman may be grantee in a deed made by a stranger, without the consent of her husband; who may however disagree thereto, and devest the whole estate. If he neither agree nor disagree, the purchase is good. After the death of the husband, although he agreed thereto, yet the wife may, without any cause alleged, waive the same; and so may her heirs, if after the decease of her husband, she herself agreed not.

1 Inst. 3 *a*.

42. A wife cannot by the common law be the immediate grantee of her husband; but she may take an estate from him through the medium of the statute of uses. Thus a man may covenant with others to stand seised to the use of his wife; or make a feoffment, or other conveyance, to the use of his wife.

Idem, 112 *a*.

Tit. 11. c. 3. § 28. infra, c. 13.

43. In consequence of the several statutes against mortmain, all corporations, whether lay and civil, or religious and eleemosinary, have for a long time been incapable of taking lands by deed, without licence from the Crown.* But as these statutes did not extend to charitable uses, lands might still be given for the maintenance of a school, hospital, or other purpose of that nature.

Conveyances to charitable Uses.

7 & 8 Wm. 3. c. 37.

44. It was therefore enacted by the statute 9 Geo. II. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for, or

* Sir W. Blackstone says, that even a licence from the Crown is not in all cases sufficient. 1 Comm. 479.

charged with, any charitable use whatever, unless by deed indented, executed in the presence of two witnesses, twelve months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution; and unless such gifts be made to take effect immediately, and be without power of revocation. And that all other gifts shall be void.

Vide Highmore on Mortmain. Grieves v. Case, 2 Cox R. 301.

45. The two universities, their colleges, and the colleges of Eaton, Winchester, and Westminster, are excepted out of this act. With this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows and students upon their respective foundations.

2° Consideration.

46. At common law a consideration was not essentially necessary to the validity of a deed. Thus in

308. Plowden it is said *arguendo* that, by the law of England, there were two ways of making contracts for lands or chattels; the one by words, the other by writing: and because words were often spoken inadvisedly, and without deliberation, the law had provided that a contract by words should not bind without consideration. But where the agreement was by deed, there was more time for deliberation; for which reason deeds were received as a lien final to the party, and were adjudged to bind him, without examining upon what cause or consideration they were made.

Bac. Read. 13.

Year Book, Trin. 17 Ed. 4. 4 *b.*

47. Thus, in 17 Edw, IV. where a person promised by deed to give another twenty pounds, it was held that an action of debt lay upon the deed; and that the consideration was not examinable; for in the deed there was a sufficient consideration, namely, the will of the party who made the deed. A doctrine which has been assented to in modern times.

3 Burr. 1670. 7 Term R. 350, note.

48. It should however be observed, that though a deed entered into without any consideration is valid at law, between the parties; yet in many cases it is void as to strangers. It may therefore be laid down generally that a consideration is necessary to render a deed valid against all persons. infra, c. 26.

49. The Court of Chancery will not lend its aid to carry a deed into execution, unless it is supported by some consideration. For "equity is remedial only to those who come in upon an actual consideration. So that although a voluntary conveyance, which is good in law, is sufficient likewise in equity; yet a voluntary defective conveyance, which cannot operate at law, is not helped in equity, in favour of a bare volunteer; where there is no consideration expressed or implied." Treat. of Eq. B. 1. c. 5. § 2. Osgood v. Stroud, 2 P. Wms. 245. 1 Ves. Jun. 54. Vide infra. c. 26.

50. There must be not only a consideration in equity, as a motive for relief, but it must be a stronger consideration than what is on the other side. For if it is only equal, then the balance will incline neither way, and the Court will not interfere. Treat. of Eq. B. 1. c. 5. § 3.

51. Thus where there are two conveyances, without consideration, of the same lands; the Court of Chancery will not relieve the latter against the former: so that in such case he who has the legal estate will hold it. Goodwin v. Goodwin, 1 Cha. R. 173.

52. There are some deeds deriving their effect from the statute of uses; namely, a bargain and sale, and a covenant to stand seised to uses; to the first of which a pecuniary consideration, and to the second a good consideration, is absolutely necessary; otherwise they are void. infra, c. 9. & 10.

53. Considerations are of two kinds, civil and moral: The first, which is usually called a valuable consideration, is money, or any other thing that bears Different Kinds of.

a known value. Marriage also forms a valuable consideration.

The second, which is called a good consideration, arises from an implied obligation; such as that which subsists between a parent and child, for children are considered in equity as creditors, claiming a debt, founded on the moral obligation of the parent to provide for his child.

The love and affection which a man is naturally supposed to bear to his brothers and sisters, nephews and nieces, and heirs at law; and the desire of preferring and preserving his name and family, are also held to be good considerations.

54. The payment of a man's debts is deemed a good consideration; as every man is under a moral obligation of satisfying his lawful creditors.

55. It should however be observed, that considerations against the policy of the law, the principles of justice, or the rules of morality, are utterly void: it being a rule both of law and equity, *ex turpi contractu actio non oritur.*

infra, ch. 25.

Treat. of Eq. B. 1. c. 5. § 1.

56. A consideration is either express or implied. An express consideration is where the motive or inducement of the parties to a deed, is distinctly declared. A consideration is implied, where an act is done or forborne at the request of another, without any express stipulation; in which case the law presumes an adequate compensation for the act of forbearance, to have been the inducement of the one party, and the undertaking of the other.

3° Writing.

57. The third circumstance necessary to a deed is, that it be written or printed; although it may be in any language or character whatever. It must be written on paper or parchment; for if it be written on stone, board, linen, leather, or the like, it is no deed.

1 Inst. 229 *a.*

Wood and stone may be, says Sir W. Blackstone, more durable, and linen less liable to erasures; but writing on paper or parchment unites in itself, more perfectly than in any other way, both these desirable qualities; for there is nothing else so durable, and at the same time so little liable to alterations. 2 Comm. 297.

58. All the matter and form of a deed must be written before the sealing and delivery of it. For if a man seals and delivers an empty piece of parchment or paper, though he at the same time give directions that an agreement shall be written above, which is accordingly done, yet it is not a good deed. Touch. 54.

59. A deed of revocation, and a new settlement made by that deed; though after the sealing and execution thereof, blanks were filled up, and not read again to the party, or resealed and executed; was held good. Paget v. Paget, 2 Cha. R. 187.

60. A deed must also have the regular stamps required by the several statutes made for that purpose; otherwise it cannot be given in evidence, It should however be observed, that the laws which require all deeds to be stamped, do not prevent their legal effect and operation, but only suspend their being pleaded, or given in evidence, or admitted in any court to be good, useful, or available, till the duty and penalty be paid, and the deed be properly stamped. The omission of the stamps in the first instance is therefore immaterial, if the deed be afterwards duly stamped. A proper Stamp. Fearne's Post. Works, 411.

61. The fourth circumstance necessary to a deed is, that there be words sufficient to specify the agreement, and bind the parties, legally and orderly set forth: that is, there must be words sufficient to signify the terms and conditions of the agreement, 4. Sufficient Words.

and to bind the parties; which sufficiency must be left to the law to determine.

1 Inst. 6 *a.* 62. Ancient deeds were extremely short, and suited to the simplicity of the times; but when deeds grew more complicated, it became customary to divide them into several formal parts: and although it is not absolutely necessary that a deed should be divided in this manner, provided there are sufficient words to show the meaning and intention of the parties; yet as these formal and orderly parts are calculated to convey that meaning in the clearest, most distinct, and effectual manner; and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them; without good reason, or urgent necessity.

Formal Parts. 63. These formal and orderly parts are, 1. The premises. 2. The *habendum*. 3. The *tenendum*. 4. The *reddendum*. 5. The condition. 6. The warranty. 7. The covenants: and 8. The conclusion.

1 Inst. 6 *a.* 64. The premises of a deed contain all that part which precedes the *habendum*, that is, the date, the parties names and descriptions, the recital, the consideration, and receipt thereof, the grant, the description of the things granted, and the exception, if any.

65. The *habendum* declares what estate or interest is granted by the deed, though that may be also done in the premises. The description of the things granted need not be repeated in the *habendum*; as it is sufficient that they are described in the premises.

66. The *tenendum* was formerly used to express the tenure by which the estate granted was to be held; but since all freehold tenures have been con-

verted into socage, the *tenendum* is of no further use, and is therefore joined to the *habendum*.

67. The *reddendum* is that whereby the grantor reserves some new thing to himself, out of what he has granted before. 1 Inst. 47 *a*.

68. The fifth part of a deed is the condition, which has been described in a former title. Tit. 13.

69. The warranty is described by Lord Coke to be "a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same: and either upon voucher, or judgement in a *warrantia chartæ*, to yield other lands and tenements, to the value of those that shall be evicted by a former title; or else may be used by way of rebutter." 1 Inst. 365 *a*.

70. The covenant is an agreement by which one of the parties obliges himself to do something beneficial to, or to abstain from something, which, if done, might be prejudicial to another of the parties.

71. The last part of a deed is the conclusion, which mentions the execution, and the date, either expressly, or by reference to the beginning.

72. The fifth circumstance necessary to a deed is, that it be read, if any of the parties require it; if not, the deed will be void, as to the party requiring it to be read. If a person can, he should read it himself; and if he be blind or illiterate, some other should read it for him. If it be read falsely, it will be void, at least for so much as was misread; unless it be agreed, by collusion, that the deed should be read false, on purpose to make it void; for in such a case it will bind the fraudulent party. 5° Reading if required. Manser's Case, 2 Rep. 3. Thorowgood's Case, Id. 9. Shulter's Case, 12 Rep. 90. Anon. Skin. 159. 2 Atk. 327.

73. The sixth circumstance required is sealing and signing. 6° Sealing and Signing.

Upon the establishment of the Normans in England, the practice of authenticating all written in-

2 Comm. 306. struments by waxen seals only, was introduced. And in the reign of Edw. I. every freeman, and even such of the most substantial villeins as were fit to be put upon juries, had their particular seals.

74. Sealing alone was sufficient to authenticate a deed, till the reign of Charles II., and is still necessary; for no written agreement is considered as a Perk. § 130. deed, unless it be sealed. But if a stranger seal an instrument by the allowance or commandment precedent, or agreement subsequent, of the person that is to seal it, it is sufficient: therefore, if another man seal a deed of mine, and I take it up after it is sealed, and deliver it as my deed, this is said to be a good agreement to, and allowance of the sealing, and so a good deed. If the party seal the deed with any seal beside his own, or with a stick, or any thing else, it is equally good.

§ 134. 75. Perkins says, it is not requisite that there be for every grantor, &c. who is named in the deed, a several piece of wax; for one piece of wax may serve for all the grantors, &c. which are named in the deed, if every one of them put his seal upon the same piece of wax, or if another do so for them, if the words of the deed imply so much; that is, if it be said in the deed, *in cujus rei testimonium sigilla nostra apposuimus*, or words to that effect.

76. One of the incidents to a corporation, is to have a common seal, to authenticate their proceedings, and to prove that what is done is the act of the cor- Anon. 12. Mod. 423. porate society. But Lord C. J. Holt has said, that if a person pretending to be mayor of a corporation, put the corporation seal to a deed, yet it is not, by that, the deed of the corporation.

77. By the statute 29 Cha. II. c. 3. usually called the statute of frauds, it is enacted, that all conveyances of lands shall be in writing, and signed by the

parties. This statute, with the cases that have arisen on it, will be stated in the next chapter.

78. A person may appoint another to be his attorney, to execute a deed for him; but in such case it must be executed in the name of the principal; and the power of attorney is now frequently annexed to the deed. Frontin v. Small, Stra. 705.

79. One who executes a deed for another, under a power of attorney, must execute in the name of his principal. But if that be done, it matters not in what form of words such execution is denoted, by the signature of the names. Wilkes v. Back, 2 East, 142.

80. The seventh circumstance necessary to a deed is, that it be delivered by the party himself, or by his certain attorney. For a deed only takes effect from its delivery; and if the date be a false or impossible one, the delivery ascertains the time from which the deed takes effect. 7° Delivery. Goddard's Case, 2 Rep. 4 *b.* 1 Salk. 463.

81. If another person seals the deed, yet if the party delivers it, he thereby adopts the sealing, and (says Sir W. Blackstone), by a parity of reason, the signing also, and makes them both his own. This doctrine does not appear reconcileable with the statute of frauds, which indirectly requires that all deeds should be signed by the party himself, or his agent lawfully authorized. And the universal practice is, for the party to sign the deed, and to acknowledge the seal as his. Perk. § 130. 2 Comm. 307.

82. The deed of a corporation does not need any delivery; for the apposition of their common seal gives perfection to it, without further ceremony. Willis v. Jermin, Cro. Eliz. 167.

83. The usual mode of delivering a deed is to take it up and say—"I deliver this as my act and deed."—But a deed may be delivered without words; so a deed may be delivered by words, without any act of 1 Inst. 36 *a.* Thoroughgood's Case, 9 Rep. 136.

delivery; as if the writing lies upon the table, and the feoffor says to the feoffee, go and take up the said writing, it is sufficient for you; or, it will serve your turn; or, take it as my deed, or the like words, it is a sufficient delivery.

Shelton's Case, Cro. Eliz. 7.

84. A lessee for years granted his term by deed, and sealed it in the presence of the grantee and several other persons. The deed at the same time was read, but not delivered; nor did the grantee take it, but it was left behind in the same place. The opinion of all the Judges was, that it was a good grant; for the parties came for that purpose, and performed all that was requisite for the perfecting it, except an actual delivery; and it being left behind them, not countermanded, it should be said a delivery in law.

Touch. 57.

85. A deed may be delivered to the party himself, or to any other person, by sufficient authority from him, or it may be delivered to any stranger, for and on behalf and to the use of him to whom it is made, without authority. But if it be delivered to a stranger, without any such declaration, it seems that will not be a sufficient delivery.

Perk. § 154. Touch. 60. 1 Inst. 48 *b.* Stephens v. Elliot, Cro. Eliz. 484.

86. A deed cannot be delivered twice, for if the first delivery has any effect, the second will be void. Thus if an infant, or a person under duress of imprisonment, delivers a deed; in which case the deed is not void, but only voidable; and after the infant being of full age, or the person who was under duress being at large, do deliver the deed again, such second delivery is void. But where a married woman delivers a deed, and after her husband's death, delivers it again, the second delivery is good; because the first was void.

ante, § 27.

Delivery as an Escrow.

87. The delivery of a deed may be either absolute, that is, to the grantee, or to some person for him;

or conditional, that is, to a third person, to keep it till some thing is done by the grantee: in which last case it is not delivered as a deed, but as an escrow, that is, a scrowl or writing, which is not to take effect, till the condition is performed; when it becomes a good deed.

88. Where a deed is delivered as an escrow, it is of no force till the condition is performed; and although the party to whom it is made, should get it into his possession, before the condition is performed, yet he can derive no benefit from it. But if either of the parties die before the condition is performed, and afterwards the condition is performed, the deed becomes good, and will take effect from its first delivery. For there was *traditio inchoata* in the lifetime of the parties; *et postea consummatio existens*, by the performance of the condition. Touch. 59. 3 Rep. 35 *b.*

89. Where a person who delivers a deed as an escrow, has not power or ability in law at that time to make the deed, and before the second delivery he attains such power, there the deed is void. But where the person at the first delivery has power and ability in law to contract, but cannot perfect it till an impediment be removed; there, if the impediment be removed, before the second delivery, the deed is good. Idem.

90. If an unmarried woman delivers a deed as an escrow, and before the second delivery, she marries or dies; in such a case, for necessity, *ut res magis valeat quam pereat*, by fiction of law, this shall be a good deed, *ab initio*. Idem.

91. In the delivery of a deed as an escrow, two things must be attended to. First, that the form of the words used in the delivery be apt and proper; The proper words are these—"I deliver this to you Touch. 58.

as an escrow, to deliver to the party as my deed, upon condition that he deliver to you 20*l.* for me;" or upon any other condition then mentioned. This mode of delivery ought to be taken notice of in the attestation.

Idem. 1 Inst. 36 *a.* 9 Rep. 137 *a.*

92. Secondly, that the delivery of the deed as an escrow, be to a stranger; for if a person delivers a deed to the party himself, to whom it is made, as an escrow, upon certain conditions, the delivery is absolute, and the deed will take effect immediately: nor will the party to whom it is delivered, be bound to perform the conditions.

8. Attestation by Witnesses. 2 Rep. 5 *a.*

93. The eighth and last circumstance necessary to a deed, is the attestation of it by witnesses; which is not a thing essential to the deed itself; but only constitutes the evidence of its authenticity.

Garret v. Lister, 1 Lev. 25.

94. In the reign of Queen Elizabeth, deeds were often without witnesses. In 13 Cha. II. a counterpart of an old lease without witnesses, was allowed as good evidence; and Mr. Justice Windham said, he had seen several deeds made in Queen Elizabeth's time without witnesses.

Park v. Mears, 2 Bos. & Pul. 217.

95. It is not necessary that the witness should actually see the party execute the deed; for if he be in an adjoining room, and the party after executing the deed brings it to him, tells him he has done so, and desires him to subscribe his name as a witness, that is sufficient.

TITLE XXXII.

DEED.

CHAPTER III.

Of the Statute of Frauds.

1. *Statement of the Statute.*
4. *Construction of the 4th Section.*
5. *What amounts to an Agreement.*
11. *What is a sufficient signing.*
17. *An Agent may be authorized to sign by Parol.*
18. *A Letter is an Agreement.*
23. *Letters previous to Marriage.*
29. *Parol Agreements good in Equity.*
30. *Where there is Fraud.*
34. *Where there is a Part Performance.*
36. *What Acts are a Part Performance.*
37. *Delivery of Possession.*
40. *Payment of Purchase Money*
42. *Introductory Acts not a Part Performance.*
48. *Parol Agreements not decreed though confessed.*
51. *A written Agreement discharged by Parol.*
53. *Where an Averment is admissible.*

SECTION 1.

Statement of the Statute.

THE first section of the statute, 29 Cha. II. c. 3. commonly called the statute of frauds and perjuries, enacts, "That all leases, estates, interests of freehold, or terms for years, or any uncertain interest, of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases and estates at will only; and shall not either

in law or equity be deemed or taken to have any other or greater force or effect."

By the 2d section, leases for three years, whereupon the rent reserved amounts to two thirds of the full improved value, are excepted.

2. By the 3d section it is enacted, "That no leases, estates, or interests, either of freehold, or terms for years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, &c., shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

3. By the 4th section it is enacted, "That no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Construction of the 4th Section.

4. A great number of cases have arisen upon the construction of that part of the fourth section of this statute which relates to marriage agreements, and contracts for the sale of lands; which I shall endeavour to class under the following heads: 1. What amounts to an agreement or contract: 2. What is a sufficient signing of an agreement or contract: 3. In what cases a written note or letter will be considered as a sufficient agreement: and 4. In what cases a parol agreement is out of this act, and supported in equity.

5. With respect to the agreement in writing required by the statute, no precise form is necessary; it must however contain all the terms of the contract, distinctly set forth; and be made with the privity and consent of all the contracting parties. What amounts to an Agreement.

6. Any written evidence of an agreement will operate as a contract within the statute. Thus an instrument originally intended as a deed, but which became void by subsequent events, was held to amount to an agreement, upon which a specific performance was decreed. Cannel v. Buckle, 2 P. Wms. 342.

7. A mere entry by a steward in his contract book with the tenants, is however not evidence that there is an agreement for a lease, between the lord and one of his tenants; unless supported by proof. Charlewood v. D. of Bedford, 1 Atk. 497.

8. A particular in writing for the sale of an estate will not amount to an agreement, though it be proved to have been shown to the purchaser; unless it be also proved that it was shown to him on his purchase, and that he purchased by it. Cass v. Waterhouse, Prec. in Cha. 29.

9. Where an estate is sold by public auction, and the auctioneer puts down the name of the purchaser in writing, this does not amount to an agreement within the statute, as to real property; though sufficient for chattels. In a late case Sir W. Grant said—"The proposition that the auctioneer's receipt may be a note or memorandum of an agreement within the statute, is not denied: but for that purpose the receipt must contain in itself, or by reference to something else must show, what the agreement is. In this instance one very material particular, the price to be paid for this estate, does not appear upon the receipt: for the amount of the deposit, unless we know the proportion it bears to the price, does not show what the price is; and the receipt contains no Blagden v. Bradbear, 12 Ves. 466.

reference to the conditions of sale, to entitle us to look at them for the terms."

Att. Gen. v. Day. 1 Ves. 218.

10. A bidding for an estate before a Master in Chancery, amounts to an agreement within the statute. Upon the same principle it is held, that the Court of Chancery will carry into execution, against the representatives, a purchase by a bidder before the Master, without the bidder's subscribing, after confirmation of the Master's report that he was the best bidder; the judgement of the Court taking it out of the statute. So if the authority of an agent, who subscribed for a bidder before the Master, cannot be proved, yet if the Master's report can be confirmed, the Court will carry it into execution; unless there be some fraud.

What is a sufficient Signing. Wheeler v. Newton, Prec. in Cha. 16.

11. It was formerly held, that an agreement must have been sealed as well as signed; otherwise it could only be considered as a parol agreement, and that the writing was only evidence of it. But this was altered; and signing being the only thing required by the words of the statute, was deemed sufficient.

1 Cha. Ca. 164. 2 Bro. R. 564.

12. In the case of Horton v. Gray, 36 Cha. II.; and also in the case of Coleman v. Upcot, which will be stated hereafter; it was held that an agreement, signed by the party to be charged with the same, was sufficient; and that it was not necessary for an agreement to be signed by both parties. This doctrine has been assented to in modern cases.

7 Ves. 275. 9 —— 351.

Bawdes v. Amhurst, Prec. in Cha. 402.

13. It is said by Lord Cowper, that he knew of no case where an agreement, though all written with the party's own hand, had been held sufficient, unless it had been likewise signed by him; that the party's not signing it was evidence that he did not think it complete; that he had left it to an after consideration, and might make alterations or additions in it: there-

fore, unless it was signed by him, or something equivalent done, to show that he looked upon it as completed, he thought such writing by the party himself was not sufficient to bind him within the statute.

14. Although a purchaser makes alterations in the draft of an intended conveyance, and returns it to the attorney of the vendor; yet this is not a sufficient signing within the statute. Hawkins v. Holmes, 1 P. Wms. 770.

15. It was resolved by Lord Hardwicke, that where a person subscribed a deed, as a witness, to which she was not a party, but knew the contents of it, which constituted a complete agreement, such signing was sufficient. For the meaning of the statute was to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other. Therefore, both in the Court of Chancery, and in the Courts of Common Law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the terms have never been insisted on. Welford v. Beazeley, 3 Atk. 503. 1 Wils. 118.

16. In a modern case it was held by Lord Eldon, that a vendor of an estate was bound by the ssignature of the agent's clerk, thus, "Witness E. S. for Mr. Smith, agent for the seller," upon evidence of assent. He expressed his approbation of the doctrine laid down by Lord Hardwicke in Welford v. Beazeley, that where either the party himself, or a person duly authorized by him, ascertains the agreement, by a signature in the form of addition, that signature of that instrument ascertains the agreement sufficiently within the statute; though not a signing as an agreement, yet sufficient to identify the agreement: the instrument itself containing the terms; and therefore sufficient within the statute. But he expressed a doubt whether the insertion of the name in the body of the Coles v. Trecothick, 9 Ves. 234. ante, § 15. Stokes v. Moore, 1 Cox R. 219

agreement, was a sufficient signature within the statute.

An Agent may be authorized to sign by Parol.

17. It is observable, that in the 4th section of the statute, it is not required, as in the first section, that the agent should be authorized by writing. In the

5 Vin. Ab. 524. pl. 45.

case of Waller v. Hendon, before Lord Macclesfield, it was held, that an authority to treat or buy, may be good without writing, though by the statute the contract itself must be in writing. And in a modern

9 Ves. 250. 10—311.

case Lord Eldon said—"It is clearly settled now, that an agent need not be authorized in writing."

A Letter is an Agreement. Coleman v. Upcot, 5 Vin. Ab. 527.

18. It has been held, that a letter will amount to a sufficient agreement within the statute, where it is signed by the party to be charged with the same. But the letter must sufficiently specify all the terms upon which the agreement is made; or refer to some written agreement, in which all the circumstances are specified; and not require any external evidence to explain it: for otherwise that which the statute was made to prevent, namely, fraud and perjury, would be let in. It must likewise appear that the other party accepted the terms, and acted in contemplation of them.

Seagood v. Meale, Prec. in Cha. 560.

19. A bill was brought for a specific execution of an agreement, for the purchase of nine houses. The owner had agreed to sell them to the plaintiff for a certain sum: the plaintiff paid a guinea in part; and sent a note to his solicitor to this effect:—"Mr. L. pray deliver my writings to the bearer; I having agreed to dispose of them." The defendant insisted on the statute of frauds; and the question was, whether this note would take it out of the statute. It was decreed that it would not; for it ought to be such an agreement as specified the terms thereof, which this did not, though signed by the party; for it did

not mention the sum that was paid, nor the number of houses to be disposed of, whether all or some, or how many, nor to whom they were to be sold: neither did the letter mention whether they were to be disposed of by way of sale or by assignment of lease. So all the danger of perjury, which the statute was to provide against, would be let in to ascertain the agreement.

20. The plaintiff had agreed for the purchase of an estate from the defendant, but the agreement was not reduced into writing. However, in confidence, plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate. Sometime after, the defendant sent a letter to the plaintiff, to inform him, that at the time he contracted for the sale of the estate, the value of the timber was not known to him; and that the plaintiff should not have the estate, unless he would give him a larger price. A bill was brought to carry this agreement into execution; to which the statute of frauds was pleaded. Clerk v. Wright, 1 Atk. 12.

Lord Hardwicke allowed the plea, and said, that the letter could not be sufficient evidence of the agreement, the terms of it not being therein mentioned.

21. In a modern case, where the defendant acknowledged by letter an agreement for the sale of an estate, which had been reduced into writing, but not signed; it was held to be a sufficient agreement within the statute of frauds. And Lord Thurlow said—"If the letter contains the terms of the agreement, or if it refers to another letter, which contains the terms, that is sufficient. For I am of opinion, that if a letter refers so clearly to an agreement, as to show what was meant by the parties, where the existence of the paper is Tawney v. Crowther, 3 Bro. R. 161. 318.

proved by parol, that will take the case out of the statute."

Ford v Compton, 2 Bro. R. 32. 309.

22. A letter of this kind must have the proper stamps put on it, in order to make it evidence.

Letters previous to Marriage.

23. There have been several cases in which a father or near relation promises by letter to give a portion to his daughter or cousin in marriage; which has been held to amount to a contract within the statute.

Bird v. Blosse, 2 Vent. 361. Skin. 142.

24. A. wrote a letter, signifying his assent to the marriage of his daughter with J. S., and that he would give her £1,500. Afterwards, by another letter, upon a farther treaty, he went back from the proposals in his former letter; but some time after, he declared he would agree to what was proposed in his first letter. This was held a sufficient promise in writing within the statute; the last declaration having set the terms in the first letter up again.

Moor v. Hart, 1 Vern. 110.

25. On a treaty of marriage, the father of the lady agreed, by letter to a third person, to give a certain portion to his daughter; this was held to be binding, and out of the statute.

Wankford v. Fotherly, 2 Vern. 322. 2 Freem. 201.

26. A., in a letter written by his direction, promised to give £1,500 portion with his daughter. A. was afterwards privy to the marriage, and seemed to approve of it. Decreed, that A. should pay £1,500 as his daughter's portion. The decree was affirmed in the House of Lords.

Cookes v. Mascall, 2 Vern. 200.

Prec. in Cha. 561.

27. The principle of these cases is, that a man who marries a lady upon the encouragement of a letter, shall recover what is promised in such letter; because the agreement is executed on his part, as far as it can be, and can never be undone after. But where a man marries without any knowledge of such a letter, a court of equity will not decree the performance of any promise contained in it.

28. The plaintiff courted one of the daughters of Sir T. Haslewood, and treated with the father about the marriage, who consented, and wrote a letter signed with his name to his daughter, intimating that he had met the plaintiff, had agreed to give him 3,000*l.* as a portion; to which the plaintiff, he said, seemed to assent; and that they were to meet the next day, when the affair was to be fully concluded. They met accordingly, and agreed to the marriage. The father gave money to the daughter to buy wedding clothes. The wedding-day was appointed, but the father died prior to it, having made his will long before, and given his daughter 2,000*l.* The daughter did not show this letter to her intended husband whom she afterwards married. The 2,000*l.* was paid to the husband; who did not make any settlement on his wife. Ayliffe v. Tracy, 2 P. Wms. 65.

Lord Macclesfield said,—This being no more than a communication, had no ingredient of equity. The husband made no settlement: he did not know of the letter, it being written to the daughter; he therefore could not be supposed to have married in consequence of it; and dismissed the bill.

29. Notwithstanding the statute of frauds, parol agreements have been frequently enforced in equity in the following cases. 1. Where the reducing them into writing has been prevented by fraud. 2. Where there has been a part performance of them. Parol Agreements good in Equity.

30. Where the reducing an agreement into writing, or the signing of it, is prevented by fraud, the Court of Chancery will support it; because it is one of the principal objects of a court of equity to relieve against fraud. Where there is Fraud. 1 Ab. Eq. 19.

31. A father, on a treaty for the marriage of his daughter with the plaintiff, signed a writing com- Mallett v. Halfpenny, Prec. in Cha. 404.

prising the terms of the agreement, and afterwards designing to elude it, directed his daughter to get the plaintiff to deliver it up, and then to marry him, which she did. The plaintiff was relieved.

Maxwell v. Montacute, Prec. in Cha. 526.

32. It is laid down by Lord Macclesfield, that where on a treaty for a marriage, or on any other treaty, the parties come to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they rely wholly on their parol agreement; unless this be executed in part, neither party can compel the other to a specific performance; for that the statute of frauds is directly in their way. But if there be any agreement for reducing the same into writing, and it is prevented by the fraud and practice of the other party, the Court of Chancery will in such a case give relief: as where instructions were given, and preparations made for the drawing of a marriage settlement, but before the completing of it, the woman was induced, by the assurance and promises of the man to perform it, to marry him.

1 P. Wms. 620.

33. It was also said by the Court, in the same case, that where there was fraud, equity would relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed, in lieu of the former.

Where there is a Part Performance.

34. It is said in the Treatise of Equity, b. i. c. 3. § 8. that if a parol agreement be carried into execution by one of the parties, as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed; and it is unconscionable that the

party who has received the advantage, should be admitted to say that such a contract was never made.

35. Lord Cowper, in confirmation of this doctrine has said, that wherever a parol agreement is begun to be put in execution, and intended to be continued, there, though there be no writing, yet the Court of Chancery will enforce its execution, notwithstanding the statute of frauds. Gilb. R. 2.

36. With respect to the acts which have been held to be a part performance of an agreement, the general rule is, that they must be such as could be done with no other view or design than to perform the agreement; such as delivery of possession; and payment of the whole, or a considerable part of the consideration. What Acts are a Part Performance.

37. The delivery of possession and laying out money has always been held to be a part performance of a parol agreement; so as to take it out of the statute of frauds. Delivery of Possession. 3 Atk. 1.

38. The plaintiff having a house in London, agreed with the defendant for a lease of a piece of ground adjoining, for as long time as he had in the house: thereupon the plaintiff entered upon the ground, built a wall, and made a vault, for the convenience of his house: when he had so done, the defendant refused to make him a lease; whereupon the plaintiff preferred his bill to have an execution of the agreement. The defendant pleaded the statute of frauds; the agreement not being in writing. The plea was over-ruled by the Lord Keeper; and the Master of the Rolls decreed the defendant to perform the agreement, saying, that the statute was not made to encourage frauds and cheats; for the plaintiff having laid out his money in pursuance of the agreement, Floyd v. Buckland, 2 Freem. 268. 1 Vern. 363. 2 —— 455.

and taken possession of the land, the defendant ought to execute a lease.

Aylesford's Case, Stra. 783.

39. There was a parol agreement for a lease for 21 years, upon which the lessee had entered and enjoyed for six years; then the lessor brought a bill to oblige the lessee to execute a counterpart, for the residue of the term; to which he pleaded the statute of frauds; which was over-ruled, the agreement being in part performed.

Wills v. Stradling, 3 Ves. 378.

Payment of Purchase Money. 3 Atk. 1. ante, § 19.

40. It is laid down by Lord Hardwicke in the case of Lacon v. Mertins, that payment of money had always been held to be a part performance of an agreement. But in Seagood v. Meale, where a guinea only was paid out of £150; that was said not to be a part performance; it being only meant as earnest.

Main v. Melbourne, 4 Ves. 720.

41. In a modern case, where five guineas were paid, upon a parol agreement, for the purchase of a lot of land, of which the price was 105 *l.*; Lord Rosslyn said, that though payment of a substantial part of the purchase money would take an agreement, as to land, out of the statute of frauds, on the ground of part performance; yet that payment of a small sum would not do so; and allowed the plea of the statute.

Introductory Acts not a Part Performance.

42. It has however been always held, that acts merely introductory to the completion of an agreement, such as giving instructions for a settlement, or going to view an estate contracted for, are not such a part performance as to take it out of the statute.

Bawdes v. Amhurst, 1 Ab. Eq. 21. Prec. in Cha. 402.

43. In consequence of a treaty of marriage, the lady's father and the intended husband went to Mr. Minshul's chambers, who was to draw the settlement, as counsel for the lady; and Mr. M. took down minutes thereof in writing. The next day the lady's father died, and the day after the marriage took

place. The husband and wife brought a bill for a specific execution of the agreement; but it was declared not to be such as the Court of Chancery would execute. And Lord Cowper said he had always been tender in laying open that just and wise provision the Parliament had made. That the act had not only directed such agreements to be in writing, but went further, and directed them to be signed by the parties themselves, or some other lawfully authorized by them for that purpose.

44. Mr. Bagenel entered into a parol agreement with Whaley for the sale of an estate in the county of Carlow, delivered to him a rent-roll of the lands, which was dated and altered with Bagenel's own hand, and showed by the title of it, that an agreement had been made, between him and Whaley, for the sale of the estate at 21 years purchase: an abstract of the title was also delivered to Whaley together with the deeds. Bagenel wrote letters to several of his creditors, informing them that he had contracted with Whaley for the sale of his estate at 21 years purchase, and sent the tenants to treat with Whaley for the renewal of their leases. Upon an inquisition held by virtue of a writ of *elegit*, sued out by one of Bagenel's creditors, his agent produced a witness to prove that the lands were sold by Bagenel to Whaley, in consequence of which the jury found a verdict that Bagenel was not seised of the lands. Bagenel afterwards refused to perform his agreement. Whaley filed a bill in Chancery in Ireland for a specific performance: Bagenel pleaded the statute of frauds, in bar of the discovery and relief; which was allowed.

Whaley v. Bagenel, Bro. Parl. Ca. 345.

On an appeal to the House of Lords of England, it was contended by the appellant, that the statute of frauds was made in order to prevent the danger of

perjury, which might arise from parol agreements; but where there was written evidence that an agreement was made, and acts had been done by the parties, in part execution of it, the danger of perjury was removed. That where a bill was framed with proper charges of facts and circumstances, tending to take the case out of the statute of frauds, the plea of the statute ought not to be allowed in bar of the discovery sought by the bill, without a full and negative answer to such charges, as would, if proved true, be sufficient in equity to entitle the plaintiff to relief.

In support of the plea it was said, that the Irish statute of frauds was little else than a transcript of the English statute: the intent of both was the same, and every rule of construction applicable to the one, was equally so to the other. A written agreement signed by the party, or some person by him thereunto authorized, was by both acts precisely and positively required, for establishing contracts for sale of lands: and being of the substance of the contract, had never, while the contract remained executory, been dispensed with. Of this the appellant himself seemed sensible, by his charge of the respondent's having with his own hand inserted in figures in the rent-roll the amount of the rent; added the date, and struck out a denomination which he meant to preserve; which the appellant would have considered as amounting to a written agreement: but it was clearly no more than one of those many loose and unmeaning circumstances, which, if attended to, would in their consequences let in all the mischiefs meant to be prevented by the act; which gives credit only to a writing, and the party's, or his agent's, signature.

Contracts partly executed by delivery of possession,

receipt of some of the purchase money, or attended with some fraud, on the part of the vendor, who had made use of the act for sheltering fraud, were very justly decreed to be specifically performed. But those were quite foreign to the present case, which appeared, upon the appellant's own statement of it, to be no more than a proposal or treaty, attended with some inquiries, but never carried into the least execution: and no imputation of fraud lay upon the respondent throughout the whole transaction. That the plea went to the discovery as well as the relief; and rightly so, for wherever a plea is sufficient to bar the relief prayed, it must go to the discovery: otherwise the plea to the relief would be nugatory and idle. Here the whole charge rested upon a supposed agreement, which being neither reduced into writing, nor signed by the respondent, could never be decreed against him; if so, a discovery of all the matters charged in the bill would be a discovery of nothing at all, and leave the appellant in just the same state as he was. The order was affirmed.

45. In a modern case Lord Thurlow said—"If there be general instructions for an agreement, consisting of material circumstances, to be afterwards extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus penitentiæ*, he shall not be compellable to perform such an agreement as that, when he insists upon the statute of frauds." 2 Bro. R. 559.

46. Lord Alvanley, when Master of the Rolls, has said—"I admit my opinion is, that the Court has gone rather too far in permitting part performance, and other circumstances, to take cases out of the statute; then, unavoidably perhaps, after establish- 3 Ves. 712.

ing the agreement, to admit parol evidence of the contents of that agreement. As to part performance, it might be evidence of some agreement; but of what, must be left to parol evidence? I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out, repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud; therefore compensation would have been very proper. They have, however, gone farther, saying it was clear there was some agreement, and letting them prove it; but how does the circumstance of a man's having laid out a great deal of money, prove that he is to have a lease for 99 years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case.

7 Ves. 347. 47. This doctrine has been confirmed by Sir W. Grant, who has said—"I am aware there are cases, that acts done by the defendant can make a ground for compelling him to perform the agreement; but it is difficult to bring those cases to bear; for to what do those acts amount, when there is no prejudice to the plaintiff? only to proof of the existence of an agreement. The existence of the agreement may be put out of all doubt by the acts; but the objection upon of the statute, that the agreement is not in writing, remains where it did. The Court does not profess to execute a parol agreement merely because it is satisfactorily proved. In Whaley v. Bagenel, which being before the House of Lords, must supersede the authority of every other case, various acts had been done which implied that the party had sold the estate, and did not consider himself any longer the

ante, § 44.

owner of it. The question still remained, whether that agreement should be carried into execution; and it was held, that the acts done by the defendant did not entitle the plaintiff to have it specifically performed."

Parol Agreements not decreed though confessed.

48. It was formerly held, that if a bill was brought in Chancery for the execution of a parol agreement, which was in no part executed, and the defendant by his answer confessed the agreement, without insisting on the statute of frauds, the Court would decree an execution of the agreement; because, when the defendant confessed it, there was no danger of perjury, the only thing the statute intended to prevent. Prec. in Cha. 208. 374.

Cooth v. Jackson, 6 Ves. 17.

49. This doctrine has been altered, and it seems to be now settled, that upon a bill for a specific performance of a parol agreement, the defendant, though admitting the agreement by his answer, may, if he insists on the statute, have the benefit of it at the hearing; and Sir W. Grant has decided, that where the defendant insists on the statute of frauds, admissions by the answer are immaterial.

Blagden v. Bradbear, 12 Ves. 466.

Spurrier v. Fitzgerald, 6 Ves. 548.

50. If, however, the defendant admits the agreement in his answer, and submits to perform it, he will not be allowed to take advantage of the statute of frauds, in his answer to an amended bill.

A written Agreement discharged by Parol.

51. Although a written agreement cannot be altered or contradicted, in particular parts, by parol evidence; yet it is laid down by Lord Keeper North, that an agreement might, notwithstanding the statute of frauds, be discharged by parol. 2 Ab. Eq. 32.

Legatt v. Miller, 2 Ves. 299.

52. An agreement was entered into in writing for a lease of a house at 32 *l.* a year: part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth

while, barely to repair the house, but better to pull it down; therefore, without alteration of the written agreement, the house was pulled down by consent of the tenant, and an agreement was made by parol to add 8*l.* a year to the 32*l.* The tenant brought his bill for a specific performance of the written agreement, and the defendant set up the parol agreement, which Sir J. Strange, M. R allowed. This doctrine has been assented to in modern times.

3 Ves. 40. n. 9 — 250. Sugd. Vend. 113, 3d Edit.

Where an Averment is admissible.

53. In consequence of this statute, no averment, founded on parol evidence, is admissible of what passed, before or at the time when a written agreement was entered into, which tends to contradict or vary it. But in many cases, averments founded on parol evidence are admitted to explain, elucidate, or support a deed or written instrument; of which an account will be given in a subsequent chapter.

infra, c. 19.

TITLE XXXII.

DEED.

CHAP. IV.

Of a Feoffment, Gift, and Grant.

1. *Different Kinds of Deeds.*
3. *Of a Feoffment.*
7. *Livery of Seisin.*
10. *Livery in Deed.*
13. *Livery in Law.*
16. *May be by Attorney.*
18. *Livery sometimes presumed.*
19. *And supplied in Equity.*
21. *A Feoffment cannot commence in futuro.*
24. *Who may convey by Feoffment.*
30. *What Kind of Property.*
32. *Operation of a Feoffment.*
33. *Transfers the Freehold by Disseisin.*
35. *Discontinues an Estate Tail.*
36. *Creates a Forfeiture.*
37. *Of a Gift.*
38. *Of a Grant.*
43. *What may be created or conveyed by Grant.*
47. *Operation of a Grant.*
50. *Does not create a Discontinuance.*
51. *Or a Forfeiture.*

Section 1.

HAVING discussed the general nature of deeds, it will now be necessary to consider the several kinds of deeds which are known to the law, together with their various incidents and qualities. Different Kinds of Deeds.

All deeds by which lands may be conveyed or charged, derive their effect either from the common law, or the statute of uses. Of those which derive their effect from the common law, some may be called original or primary, which are those by means whereof the estate is originally created: others are derivative or secondary, whereby an estate, already created, is enlarged, restrained, transferred, or extinguished. There is a third class, which are used, not to convey,

but to charge or incumber lands, and to the discharge them again.

2. The original conveyances deriving their effect from the common law are, 1. A feoffment. 2. A gift. 3. A grant. 4. A lease. 5. An exchange. 6. A partition. The derivative conveyances are, 1. A release 2. A confirmation. 3. A surrender. 4. An assignment. 5. A defeazance. Deeds which operate to charge or discharge lands are, 1. A bond. 2. A recognizance. 3. A defeazance on a bond.

Of a Feoffment. 1 Inst. 9 a.

3. A feoffment, *feoffamentum*, is derived from the word *feoffare*, or *infeudare*; to give one a fief or feud; therefore a feoffment was properly called *donatio feudi*: and Lord Coke says the ancient writers called a feoffment *donatio*, from the verb *do* or *dedi*, which is the aptest word of feoffment.

ante, c. 1. § 21.

4. A feoffment is evidently taken from the *breve testatum* of the feudal law. The proper and original meaning of the word feoffment was the gift of a feud; but by custom it came afterwards to signify a gift of a free inheritance, or *liberum tenementum*, to a man and his heirs; respect being had rather to the perpetuity of the estate granted, than to the tenure.

Mad. Form. Dissert. 4.

5. A charter or deed of feoffment must be sealed and delivered in the same manner as other deeds. The proper and usual words of a feoffment are, give, grant, and enfeoff; but any other words of equal import will be sufficient.

Denton's Case, 2 And. 68. Benicomb v. Parker, 1 Leon. 25.

6. Thus where a bargain and sale was made to J. S. and his heirs, by deed indented, but not enrolled; and the bargainor made livery of the land, *secundum formam chartæ*: this was held a good feoffment.

Livery of Seisin. 1 Inst. 48 a.

7. The mere signing and sealing a deed of feoffment was in no instance sufficient to transfer an estate of freehold, unless the possession was formally deli-

vered by the feoffor to the feoffee. This was called livery of seisin; without which a deed of feoffment only passed an estate at will; and the law continues the same in this respect.

8. Livery of seisin is exactly similar to the investiture of the feudal law; it was adopted here for the same reason, namely, that the proprietor of each piece of land should be publicly known; that the lord might be always certain on whom he was to call for the military services due for the estate: and that strangers might know against whom they were to bring their præcipes. 5 Rep. 84 b. Plowd. 302.

9. Where the lands comprised in a feoffment are all situated in the same county, though in different *vills*, or hundreds, livery of seisin of those within one vill, in the name of the whole, will be good: but where lands lie in different counties, there must be a livery in each county; unless they are all comprised within the same manor; for there, livery of seisin in one of the counties will be sufficient. Lit. § 61. 418. Perk. § 226-7. Bro. Ab. Grant, 32.

10. Livery of seisin is of two kinds; livery in deed and livery in law. Livery in deed is the actual delivery of the possession; where the feoffor comes himself upon the land, and taking the ring of the door of the principal mansion, or a turf, or a twig, delivers the same to the feoffee in the name of seisin; or it may be by words only, without the delivery of any thing. As if the feoffor be upon the land, or at the door of the house, and says to the feoffee, "I am content that you should enjoy this land according to the deed;" this is a good livery to pass the freehold: for the charter of feoffment makes the limitation of the estate; and then the words spoken by the feoffor on the land are a sufficient indication, to the persons present, of the change of possession. Livery in Deed, 1 Inst. 48 *a*. Sharp's Case, 6 Rep. 26.

Thorough-good's Case, 9 Rep. 136. Vaughan v. Holdes, Cro. Ja. 80.

11. If a man merely delivers a deed of feoffment on the land, this will not amount to livery of seisin; for it has another operation, to take effect as a deed: but if the feoffor delivers the deed upon the land, in the name of seisin of all the lands contained in the deed, this will be a good livery.

Bettisworth's Case, 2 Rep. 31.

12. As livery of seisin is the delivery of the actual possession, it follows that no person can give livery in deed, who has not himself, at the moment, the actual possession; therefore where a person makes a feoffment of lands which are let on lease, he must obtain the assent of the lessee to the livery: and in cases of this kind, the practice formerly was, for the lessee to give up the possession for a moment to the feoffor, in order to enable him to give livery.

Livery in Law. 1 Inst. 48 *b.*

13. Livery in law is, where the feoffor is not actually on the land, or in the house, but being in sight of it, says to the feoffee, "I give you yonder house or land, go and enter into the same, and take possession of it accordingly." This sort of livery appears to have been made at first only at the courts baron, which were then held in the open air, on some spot in the manor, from whence a general view might be taken of the whole; and the *pares curiæ* could distinguish the land that was to be transferred.

Idem.

14. Livery in law does not, however, transfer the freehold, till an actual entry is made by the feoffee; because the possession is not delivered to him, but only a licence or power given him by the feoffor to take possession. Therefore, if either the feoffor or feoffee die before an entry is made, under the livery thus given, it becomes void.

Purson v. Petit. 1 Mod. 91.

1 Inst. 48 *b.*

15. If, in a case of this kind, the feoffee dare not enter on the land, without endangering his life, he

must claim the land as near as he may safely venture to go; which will be sufficient to vest the possession in him, and to render the livery in view perfect and complete, for no one is obliged to expose his life, for the security of his property.

16. Livery of seisin may be given and received by attorney. But the authority to give or receive livery must be by deed, in order that it may appear to the Court that the attorney had a power to represent the parties; and that the power was properly pursued.

May be by Attorney. Lit. § 66. 1 Inst. 52 *a*.

17. Livery of seisin under a power of attorney must be made during the lifetime of the feoffor; for the power ceases with his death: and also during the life of the feoffee; for if he dies, livery cannot be made to his heir, because then he would take by purchase, where the word heirs was a word of limitation.

Idem.

18. Courts of law and equity will presume livery of seisin to have been made, though not indorsed on the deed, where the possession has gone according to the feoffment for a great length of time.

Livery sometimes presumed. Plowd. 149. Jackson v. Jackson, Fitzg. 146.

19. A court of equity will supply the defect of livery of seisin, where a feoffment appears to have been made for a good or a valuable consideration.

And supplied in Equity.

20. Thus, where the deed under which the plaintiff claimed appeared to have been fairly executed by the plaintiff's father; that there was no defect therein, save only the form of livery of seisin; and that it was made on such valuable consideration as marriage. It was decreed, that the defendant should execute livery of seisin to the same deed.

Thompson v. Atfield, 1 Vern. 40. Burgh v. Francis, Tit. 15. c. 5. § 19.

21. A feoffment cannot be made to commence *in futuro*; so that if a person makes a feoffment, to commence on a future day, and delivers seisin immediately, the livery is void, and nothing more than

A Feoffment cannot commence in futuro. 1 Inst. 217 *a*.

an estate at will passes to the feoffee. This doctrine is founded on two grounds: first, because the object and design of the ceremony of livery of seisin would fail, if it were allowed to pass an estate which was to commence *in futuro*; as it would in that case be no evidence of the change of possession. Secondly, the freehold would be in abeyance, which, we have seen, is never allowed, where it can be avoided.

Lit. § 60.

22. An estate may, however, be created by feoffment, to commence *in futuro*, by way of remainder. As where a lease is made to A. for three years, remainder to B. in fee. Here livery of seisin must be given to A., by which an estate of freehold is immediately created, and vested in B. during the continuance of A.'s estate for years.

Norris v. Frist, 2 Mod. 78.

23. A deed of feoffment was made to three persons, *habendum* to two of them for their lives, remainder to the third for his life. Livery of seisin was made to all three, *secundum formam chartæ*. The Court was of opinion, that the livery was good to two in possession, and to the third in remainder.

Freeman v. West, 2 Wils. R. 166.

Who may convey by Feoffment.

24. All those who are capable of transferring their lands by deed may make a feoffment; and some persons may bind themselves to a certain degree by feoffment, though not by any other kind of deed.

Lit. § 406.

25. Thus, if an idiot or lunatic makes a feoffment, and gives livery of seisin in person, it will bind him; so that he cannot by any process at law avoid it. The reason is, because the livery being formerly made before the *pares curiæ*, their solemn attestation of the change of possession, could not be defeated by the person himself; it being presumed that they were competent judges of the feoffor's ability to make the feoffment.

26. If an infant makes a feoffment, and gives livery of seisin in person, it is not void, but only voidable. For there must be some act of notoriety to restore the possession to him, equal to that by which it was transferred. Idem. Perk. § 12.

27. It has been stated that a feoffment by an infant, an idiot, or a lunatic, will bar the lord of his escheat. For though it may be avoided by the heir of the infant, idiot, or lunatic, because he is privy in blood; yet it cannot be avoided by a person who is only privy in estate. Tit. 30. 4 Rep. 124 *a*. 8 —— 42.

28. But if an infant, idiot, or lunatic, executes a feoffment, and a power of attorney to give livery of seisin, and livery is given accordingly, the whole *is void*; because the power of attorney is void. Idem.

29. A corporation, whether sole or aggregate, may convey by feoffment, and appoint an attorney to give livery; and it being now understood that a corporation cannot be seised to a use, a feoffment is frequently used by corporations to create a freehold estate.

30. A feoffment can only be made of corporeal hereditaments, of which the actual possession may be delivered to the feoffee. Therefore corporeal hereditaments are frequently spoken of in law, by the name of things that lie in livery. What Kind of Property. 1 Inst. 9 *a*.

31. One joint tenant cannot enfeoff his companion, for each of them being seised *per mie et per tout*, is in possession of the whole: so that one cannot make livery to the other. But one tenant in common or coparcener may make a feoffment of his share of the land to his companion; these having, for most purposes, distinct freeholds. Perk. § 193. 7. 2 Inst. 244. Tit. 18. c. 1. Tit. 19 & 20.

Operation of a Feoffment.

32. The operation of a feoffment is in some instances stronger than that of any other conveyance.

1 Inst. 9 a.

Thus, Lord Coke says, a feoffment cleareth all desseisins, abatements, intrusions, and other wrongful or defeasible estates; where the entry of the feoffor is lawful: which neither fine, recovery, nor bargain and sale by deed indented and enrolled, doth. And

204.

it is said in the Touchstone, that it passeth the present estate of the feoffor; and not only so, but barreth and excludeth him of all present and future right, and possibility of right, to the thing which is so conveyed: insomuch, that if one have divers estates, all of them pass by his feoffment; and if he have any interest, rent, common, or the like, in, to or out of the land, it is extinguished and gone by the feoffment.

Transfers the Freehold by Disseisin.

33. The most singular effect of a feoffment is, that it operates on the possession, without any regard to the estate or interest of the feoffor; so that, to make a feoffment good and valid, nothing is wanting but possession.

§ 611.

Thus Littleton says—"Tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass; and yet he had, at the time of the feoffment made, but an estate for term of years."

34. In Lord Coke's comment on this passage he says—"Here it is implied that albeit the feoffment made by lessee for years, be a feoffment between the feoffor and feoffee; and that by this feoffment the fee simple passeth by force of the livery, yet it is a disseisin to the lessor."

Lit. § 698. 2 East. 244.

Taylor v. Horde, Tit. 36. c. 2.

The doctrine above stated, has been in some respects denied in a modern case, of which an account will be given hereafter.

35. A feoffment by tenant in tail, who is actually seised by force of the entail, creates a discontinuance of the estate tail; by transferring to the feoffee, not only the possession, but also the right of possession; so as to take away the entry of the issue in tail, as also of the persons in remainder and reversion; and to drive them to their real action. Discontinues an Estate Tail. 1 Inst. 327 *b.* Tit. 2. c. 2.

36. It has been stated, that a feoffment in fee by a tenant for life will create a forfeiture of his estate. For it transfers the fee simple, and devests the estates in remainder and reversion. Creates a Forfeiture, Tit. 3. c. 1.

37. A gift, *donatio*, is properly applied to the creation of an estate tail; as a feoffment is to that of an estate in fee simple. It differs in nothing from a feoffment, but in the nature of the estate passing by it: and livery of seisin must be given to render it effectual. Of a Gift. Lit. § 59. West. Symb. § 254.

38. A grant is a conveyance so far similar to a feoffment, that the operative words of it are *dedi et concessi*, given and granted, and as a feoffment was the regular mode of conveying corporeal hereditaments; so a grant was the proper mode of transferring incorporeal ones. Hence the expression that advowsons, rents, commons, &c. lie in grant. Of a Grant. 1 Inst. 9 *a.* 172 *a.*

39. As the objects of a grant are not capable of corporeal delivery, it follows that livery of seisin cannot be given upon a grant. But still it has always been held that a grant, acccompanied with the attornment of the tenant, was as effectual as a feoffment with livery of seisin; and now the necessity of an attornment is taken away. Stat. 4 & 5 Ann. c. 16.

40. Although a feoffment might formerly have been made by parol only, yet a grant could not in

general be made without deed; because as the possession of those things which are the subject-matter of a grant could not be tranferred by livery, there could be no other evidence of a grant but the deed.

1 Inst. 147 *a*. 41. The proper words of a grant are *dedi et concessi*, hath given and granted; but any other words that show the intention of the parties will have the same effect.

Holmes v. Sellers, 3 Lev. 305. 42. A. entered into an article with B., by which he granted and agreed, that in consideration of a certain rent, B. should have a way for himself and his heirs over certain lands of A. This was held to be a good grant of a right of way; not merely a covenant for enjoyment.

What may be created or conveyed by Grant.

Perk. § 65. 43. Grants are used to create an incorporeal hereditament, as in the preceding case; but a person cannot grant or charge that which he hath not, at the time of the grant, though he acquire it afterwards. If, therefore, a man grants a rent charge out of the manor of Dale, when in truth he hath nothing in the manor; and he afterwards purchases it, he shall hold it discharged from the grant.

44. Manors, advowsons, rents, and all other incorporeal hereditaments, may be, and are often conveyed by grant; but a bare right or possibility cannot be granted.

Tit. 16. c. 1. § 9. 45. Estates in remainder and reversion, consisting in right only, may be conveyed by grant. Thus

§ 567. Littleton says, if a man lets tenements for a term of years, by force of which lease the lessee is seised, the lessor may grant the reversion, by which the freehold will pass to the grantee, without livery of seisin.

1 Inst. 49 *a*. Lord Coke observes on this passage, that seeing this

grant of the reversion must be by deed, the freehold and inheritance do pass thereby, as well as by livery of seisin, if it were in possession. Goodtitle v. Bailey, infra, c. 19.

46. Where a person is tenant for life, with remainder to his first and other sons in tail male, with the reversion in fee in himself; it is doubtful whether he can grant the reversion, as an interest distinct from his estate for life. Tit. 18. c. 1. § 7, 8.

47. As to the operation of a grant, by which any thing already in existence is conveyed, it is materially different from that of a feoffment: for it has been shown that a feoffment operates immediately on the possession, without any regard to the estate or interest of the feoffor; but a grant only operates on the estate or interest of the grantor, and will pass no more than what he is by law enabled to convey. Operation of a Grant. 1 Inst. 251 *b.*

48. This rule probably arose from the circumstance, that a grant being always made by deed, the estate of the grantor might be known by inspection of the deed. If the estate granted was greater than the estate which the grantor had, it was merely void; and the grant only passed as much as the grantor could really give.

49. Lord Ch. B. Gilbert was of opinion, that the reason why a grant passes no more than what the grantor can lawfully pass, is, because it is a secret conveyance; therefore ought not to be allowed to have so extensive an operation as a feoffment, in which livery of seisin is given. Ten. 122.

50. A grant cannot in any case create a discontinuance, for every discontinuance works a wrong: whereas a grant only transfers what the grantor may lawfully give. Lord Coke says, if tenant in tail of a rent service, or of a reversion or remainder in tail, Does not create a Discontinuance. 1 Inst. 322 *a.* 327 *b.*

grants the same in fee, and dies, this is no discontinuance to the issue in tail.

Or a Forfeiture.

1 Inst. 251 *b.*

51. It follows from the same principle that a grant can in no instance create a forfeiture. Thus if a tenant for life or years of an advowson, rent, common, or of a reversion or remainder of land, grants the same in fee, this is no forfeiture; because nothing passes but that which lawfully may pass.

TITLE XXXII.

DEED.

CHAP. V.

Of a Lease.

1. *Description of.*
9. *Where only an Agreement for a Lease.*
13. *Must have a certain beginning and ending.*
23. *May determine by Proviso.*
24. *What may be leased.*
27. *Who may make Leases.*
30. *Tenants in Tail.*
33. *Husbands seised* Jure Uxoris.
35. *Ecclesiastics seised* Jure Ecclesiæ.
37. *Circumstances required in these Leases.*
56. *Parsons and Vicars.*
57. *Tenants for Life.*
59. *Tenants in Dower and by the Curtesy.*
60. *Tenants for Years.*
62. *Guardians.*
63. *Executors and Administrators.*
64. *Joint Tenants, Coparceners, and Tenants in Common.*
65. *Copyholders.*
66. *Who are incapable of making Leases.*
67. *Infants.*
69. *Married Women.*
70. *Of void and voidable Leases.*
86. *Who may be Lessees.*

Section 1.

A LEASE is a contract for the possession and profits of lands and tenements on the one side; and a recompence of rent, or other income, on the other. Or else it is a conveyance of lands and tenements to a person for life, or for years, or at will, in consideration of a return of rent, or other recompence. Description of.

2. Where a freehold estate is created by lease, livery of seisin must be given to the lessee. And where the lease is for a term of years, there must be an entry by the lessee. ante, c. 4. Tit. 8. c. 1.

1 Inst. 45 *b.*

3. The words demise, lease, and to farm let, are the proper ones to constitute a lease. But any other words which show the intention of the parties, that one shall divest himself of the possession, and the other come into it, for a certain time, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient; and will, in construction of law, amount to a lease, as effectually as if the most proper words had been used for that purpose.*

Bac. Ab. Tit. Lease, K.

Tooker v. Squier, Cro. Ja. 172. Hall v. Seabright, 1 Mod. 14.

Harrington v. Wise, Cro. Eliz. 486.

4. Articles in writing indented were made between A. and B. in these words: *Imprimis*, It is covenanted and agreed between the parties, that A. doth let the said lands, for and during five years, to begin at the Feast of Saint Michael next following: Provided always, that the said B. should pay to A. annually during the term 120 *l.* Also the said parties do covenant that a lease shall be made and sealed according to the effect of these articles, before the Feast of All Saints next ensuing.

The question was, whether this was an immediate lease, or only an agreement to have a lease made. All the judges held it to be a good lease. For the words, it is agreed that A. doth let, being in the present tense, was a good lease, by the words of the agreement; and that which followed was in reference to farther assurance.

Drake v. Monday, Cro. Car. 207. Tisdale v. Essex, Hob. 34.

5. Articles were entered into between A. and B., by which A. covenanted, granted, and agreed that B. should have the land for six years; in consideration of this, B. covenanted to pay a yearly rent to A. Resolved, that this was a good lease.

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* Executory agreements for leases of copyholds are construed differently on account of the forfeiture. Vide Tit. 10. c 5.

6. Two persons entered into an agreement with one Brown, that they would, with all convenient speed, grant him a lease of, and they did thereby set and let to him, the premises in question; to hold for 21 years, at a certain rent, payable half-yearly to the lessors. The lease to contain the usual covenants, and certain special ones, in one of which the words *this demise*, occurred. The Court held that this was a good lease *in præsenti*, with an agreement to execute a more formal one. The operative words, *let* and *set*, were in the present tense; and a reference was made to *this demise*. Baxter v. Browne, 2 Black. R. 973.

7. An instrument purporting to be a demise for 21 years, was as follows:—"Be it remembered that J. B. hath let, and by these presents doth demise, &c. unto R. F. for 21 years, to commence after the said J. B. hath recovered the said lands from M. O. Leases, with powers of distress, and clauses for re-entry, &c. to be drawn and signed at the request of either party, as soon as J. B. recovers the said lands from M. O." Bury v. Nugent, 5 Term R. 165.

The Court was of opinion that this instrument operated as a present demise; and that the agreement for a more formal lease was merely in further assurance. Right v. Proctor, 4 Burr. 2208.

8. It should however be observed, that no words in a deed can operate so as to create or confirm a lease to a person, not party to the deed. Doe v. Archer, 1 Bos. & Pul. 531.

9. On the other hand, if the most proper form of words of leasing are made use of, yet if upon the whole deed there appears no such intent, but that it is only preparatory, and relative to a future lease to be made; the law will rather do violence to the words, than break through the intent of the par- Where only an Agreement for a Lease.

ties, by construing it a present lease, when the intent was manifestly otherwise.

Sturgeon v. Painter, Noy, R. 128.

10. Articles were drawn between A. and B. in this manner:—*Imprimis*, A. doth demise such a close to B., to have it for 40 years, and a rent reserved, with a clause of distress, &c. Afterwards there was written in the same paper, a memorandum that these articles were to be ordered by counsel of both parties, according to due form of law.

Here, because the intent of both parties appeared by that memorandum, and by a lease actually drawn by the counsel, but never sealed; the parties disagreeing about fire-bote; it was ruled by the Court, upon evidence in ejectment, that these articles were not a sufficient lease.

Pleasant v. Higham, 1 Roll. Ab. 848.

Goodtitle v. Way, 1 Term. R. 735.

11. Upon a trial in ejectment, the defendant produced in evidence an agreement in writing, unstamped, between Lord Abingdon and the defendant's father, in the latter part of which were these words: And further, the said Earl doth hereby agree to let, and the said R. W. agrees to rent and take, &c. all his estate at Rycot. It is agreed, that the said R. W. shall enter on all the said premises immediately, but not commence payment of rent till Lady-day next. It is further agreed, that leases, with the usual covenants, shall be made and executed by the parties, on or before Michaelmas next.

The Court of K. B., on a motion for a new trial, was of opinion, that this was not a lease. The case of Sturgeon v. Painter, they said, was in point. In this case there was also an express stipulation that leases should be drawn before Michaelmas. Therefore it was plainly not the intention of the parties that such agreement should operate as a lease; but only

ante, § 10.

that it should give the defendant a right to the immediate possession, till a lease could be drawn.

12. Articles of agreement were entered into between T. S. and D. J. respecting fulling mills and other conveniences, in which were these words— "That the said mills and conveniences, with the islands and acre of land called Ashacre, he shall enjoy. And I engage to give him a lease in, for the term of 31 years from Whitsuntide 1784, at the rent, &c.; and that I will purchase one yard in breadth to be laid to the Race from the High Clews, the length of Charles Close. And if it be bought, and the purchase is more than £200 per acre, he the said D. J. to pay more than it costs beyond that rate."

Doe v. Ashburner, 5 Term R. 163.

A question arose in ejectment on this article, whether it was an actual lease, or only an agreement for a lease. After argument in the K. B., Lord Kenyon said, the question turned on the intention of the parties, as it was to be collected from the whole agreement. The words were, he shall enjoy; and I engage to give him a lease, &c.; and the question was, what was the intention of the parties using those expressions? was it that this agreement should confer the legal interest; or was it not in their contemplation that there should be another instrument, to give that legal interest? The latter words clearly showed that it was the intention of the parties, that there should be some farther assurance. It was in *fieri* at the time: and if a bill had been filed in a court of equity, for a specific performance of the agreement, that Court would not have turned the plaintiff round, and told him that he already had a legal and executed contract; but would have decreed a lease of the premises, according to the agreement. If the former words in this contract had not been restrained

by the engagement to give a lease in future, they would have operated as a perfect lease. But as the parties agreed, the one to give, the other to receive a future lease, he could not conceive that this was intended to be a perfect lease. Besides, by another part of the agreement the landlord was to acquire an additional piece of ground, to be laid to the mill, without which the lease was not to be granted; this also was of importance to show that there was to be some future instrument, to give a title to the plaintiff. All the cases cited might be answered by the observation that there were either express words of present demise, or equivocal words, accompanied with others, to show the intention of the parties, that there should not be a future lease. But in this case, where the context, in which were the words *shall enjoy*, imported that the parties did not mean that they should operate as a present demise; he thought they would decide contrary to the intention of the parties, if they were to determine that they should have that effect. It was resolved, that the instrument only amounted to an agreement for a lease.

Brown v. Warner, 14 Ves. 156, 409.
Poole v. Bentley. 12 East. 168.

Must have a certain Beginning and Ending.
1 Inst. 48 *b.* Bac. Ab. Tit. Lease, L.

13. Every lease must contain a sufficient degree of certainty, as to its beginning, continuance, and ending. If a lease be made to begin from an impossible date, as from the 30th of February, it will take effect from its delivery. But where the date or time when a lease is to commence is uncertain; as where a lease was made *habendum* from the 20th of November, without saying what November, this uncertainty will render the lease void.

Anon. 1 Mod. 180.

1 Inst. 46 *b.*

14. If a lease be made by indenture, bearing date 26th May, to hold for 21 years from the date, or day of the date; it shall begin on the 27th of May. If the lease bear date the 26th May, to hold from

the making hereof, or from henceforth, it shall begin on the day on which it is delivered. For the words of the indenture are not of any effect till the delivery; and thereby, from the making, or from henceforth, take their first effect. But if it be *à die confectionis*, then it shall begin on the day after the delivery. Clayton's Case, 5 Rep. 1.

15. This doctrine has been denied in two modern cases, in which it has been held that the word *from* may, in the vulgar sense, and even in strict propriety of language, mean either inclusive or exclusive. And where a lease can only be supported by construing the word *from* inclusive, a court ought to give it that sense. Freeman v. West, 2 Wils. R. 165. Pugh v. D. of Leeds, infra, c. 16.

16. Lord Kenyon has said, that if a lease be granted for 21 years, to commence after the death of three lives then in being, it will be good. For though it be uncertain at first, when the term will commence, yet when the lives die, it is reduced to a certainty. 3 Term R. 463. Dyer, 124. 6 Rep. 34 *b*.

17. Where a lease was made in the year 1780, to hold from the feast of St. Michael, it was held that this must be taken to mean New Michaelmas, and could not be shown by extrinsic evidence to refer to a holding from Old Michaelmas. Doe v. Lea, 11 East, 312.

18. It has been stated, that the word *term* not only signifies the period of time for which the estate is to continue, but also the estate and interest itself. And therefore, it was formerly held that if a person made a lease for 21 years, and after made a lease to begin *à fine et expiratione prædicti termini* 21 *annorum*, after which the first lease was surrendered; the second lease would commence immediately. But if it had been to begin *post finem et expirationem prædict'* 21 *annorum*; in that case, though the first term were surrendered, yet the second lease should not begin till after the Tit. 8. c. 1. 1 Inst. 45 *b*. Chedding-ton's Case, 1 Rep. 153.

21 years were expired, by effluxion of time. But this doctrine has been denied in a modern case, in which it has been held that the word *term* may signify the time, as well as the interest.

Wright v. Cartwright, 1 Burr. 282.

1 Inst. 45 *b.*

19. As to the continuance of a lease, it must also have a certainty; but *id certum est quod certum reddi potest.* Therefore a lease for so many years as J. B. shall name, is a good lease for years. For though it is at first uncertain, yet when J. B. hath named the years, it is then reduced to a certainty.

Idem.

20. If a person makes a lease for so many years as he shall live; or if the parson of D. makes a lease of his glebe, for so many years as he shall be parson there; these leases are said to be absolutely void, on account of the uncertainty of their continuance. But if a lease be made for 21 years, or any other certain number of years, provided the lessor or lessee shall so long live, or continue parson of D., it will be good; for the lease is confined to a certain number of years, though it may determine sooner.

Ferguson v. Cornish, 2 Burr. 1034. 3 Term R. 463.

21. A lease was made for seven, fourteen, or twenty-one years. It was contended that it was void for uncertainty; but the Court held it was at least a lease for seven years; then if the lessee continued, it was for fourteen; and if after that he continued, it was for 21 years.

Goodright v. Richardson, 3 Term R. 462.

22. In a modern case the court of King's Bench held, that a lease for three, six, or nine years was determinable at the end of three or six years, by *either* of the parties; on giving reasonable notice to quit. But in a subsequent case the Court of Common Pleas certified to the Court of Chancery, that where a lease was granted for seven, fourteen, or twenty-one years, the *lessee* only had the option at which of those periods the lease should determine.

Dann v. Spurrier, 2 Bos. & Pul. 399—442.

May determine by Proviso. Tit. 8. c. 1.

23. Although a lease must, at its creation, have a precise period fixed, beyond which it is not to continue; yet it may be made to determine prior to that period, by a proviso or condition. And in all modern leases there is a proviso, that if the rent is not paid, and no sufficient distress is found on the premises, the lessor may re-enter.

What may be leased. Davenport's Case, 8 Rep. 144. 10—65 *b.*

24. All lands whereof a person is in possession may be leased. There are also some kinds of incorporeal hereditaments, which may be leased. Thus an advowson appendant may be leased, with the manor to which it is annexed.

Tit. 28. c. 1.

25. Tithes, whether in the hands of ecclesiastics or lay impropriators, may be leased; and in the case of ecclesiastics, a rent may be reserved on such leases.

Jones v. Clark, Hard. 46.

26. Offices which do not concern the administration of justice, but only require skill and diligence, may be leased for years; because they may be executed by deputy, without any inconvenience to the public.

Who may make Leases.

27. All natural persons, who are capable of alienating their property, or of entering into contracts respecting it, and all lay corporations, may make leases, which will endure as long as their interest in the thing leased, but no longer.

28. By the statute 48 Geo. III. c. 75. § 4. it is enacted, that the Courts of Chancery of the United Kingdom, and of Ireland, may order the committee of the estate of lunatics, to make such leases of their estates as the Court shall direct. And where lunatics have a power of leasing, their committees are enabled to execute such power under the direction of that Court.

infra, c. 19.

29. Leases made by persons having no estate in the lands at the time, may become good by estoppel; of which an account will be given hereafter.

Tenants in Tail.

30. All leases made by tenants in tail might have been avoided by their issue, and by the persons entitled to the remainder or reversion. But by the statute 32 Hen. VIII. c. 28. § 1. it is enacted, that all leases made for term of years, or life, by any person or persons, being of full age, having any estate of inheritance, either in fee simple, or in fee tail, shall be good and effectual in law against the lessors and their heirs.

31. This statute does not however extend to persons having estates in remainder or reversion, expectant on the determination of an estate tail; who are not bound by any leases made by the tenant in tail.

1 Inst. 333 *a*. Vaugh. 383.

32. A lease by tenant in tail, which is warranted by this statute, though made by feoffment and livery, will not create a discontinuance. Because an act of parliament, to which every man is a party, allows of such leases, which, if tortious, as all discontinuances are, parliament would not allow. But if a lease by feoffment be not warranted by the statute 32 Hen. VIII. it will operate as a discontinuance.

Walter v. Jackson, 1 Roll. Ab. 633.

Husbands seised Jure Uxoris.

33. It is enacted by the same statute, that all leases made for term of years or life, by persons having an estate of inheritance in right of their wives, or jointly with their wives, of any estate of inheritance, made before the coverture, or after, shall be good and effectual in law, against the lessors, their wives and their heirs: provided that the wife be made a party to every such lease, and the lease be made by indenture in the name of the husband and wife, and she do seal the same, and that the rent be reserved to the husband and wife, and the heirs of the wife, according to her estate of inheritance in the same. And that the husband shall not in any wise alien, discharge, grant, or give away the same rent longer than during

the coverture, except by fine levied by the husband and wife: but that the same rent shall remain, after the death of the husband, to the person to whom the lands would have gone, if no such lease had been made.

34. If the circumstances required by the statute are not observed, leases by husband and wife, of the wife's lands, are not binding on wives surviving their husbands. If the wives die in the lifetime of their husbands, their heirs may avoid them. Doe v. Weller, infra.

35. At common law, leases made by ecclesiastics, of lands whereof they were seised in right of their churches, &c. were in many cases not binding on their successors: it was therefore enacted by the statute 32 Hen. VIII. c. 28. that all leases for term of years or life, by any persons having an estate of inheritance in right of their churches, shall be good and effectual against the lessors and their successors. Ecclesiastics seised Jure Ecclesiæ.

36. There are several other statutes, by which all alienations by ecclesiastical persons are declared void, except leases for 21 years, or three lives. And as the statute 32 Hen. VIII. is called an enabling statute; these are called disabling statutes. 1 Eliz. c. 19. 13 —— c. 10. 14 —— c. 11. 18 —— c. 11. 1 James, c. 3.

37. The circumstances required by the statute 32 Hen. VIII. and the subsequent statutes, to render leases made by tenants in tail, husbands seised in right of their wives, and ecclesiastical persons, valid and binding on their heirs and successors, are chiefly these. Circumstances required in these Leases.

38. 1°. All such leases must be by deed indented, and not by deed poll, or by parol. 2°. Must be made to begin from the day of the making thereof, or from the making thereof. 1 Inst. 44 *a*.

39. 3°. If there be an old lease in being, it must be surrendered or ended, within one year next after Idem.

the making of the new lease. Such surrender must be absolute, and not conditional; for then the intention of the statute might easily be evaded, by setting up such old lease again, upon breach of the condition.

Thompson v. Trafford, Poph. 9.

40. A surrender in law, by the taking of a new lease, either to begin presently, or on a day to come, seems a good surrender within the statutes. For by taking such new lease, though to commence on a future day, the first lease is presently surrendered, and gone; and shall not continue till the day on which the new lease is to commence; but by acceptance of such new lease, the first is immediately surrendered, because both leases cannot exist together. As the first cannot be dissolved, or surrendered in part, it must be surrendered for the whole.

41. A surrender upon condition that the lessor should make a new lease within a week after, has been held good.

Wilson v. Carter, 2 Stra. 1201.

42. The lessor of the plaintiff being a prebendary of Sarum, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the proviso in the statute 32 Hen. VIII., because the surrender of the former lease was with a condition, that if the then prebendary did not, within a week after, grant a new lease, the surrender should be void; whereby, as it was contended for the plaintiff, the old term was not absolutely gone; but the lesee reserved a power of setting it up again.

The Court gave judgement for the defendant, this being within the intent of the statute; which was, that there should not be two leases standing out against the successor. Here the new lease was made within the week; from thence it became an absolute

surrender, both in deed and in law: the whole was out of the lessee, without farther act to be done by him. In the proviso in the statute, there was the word *ended*, as well as *surrendered*; and could it be said that the first lease was not ended. This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made to him.

43. The stat. 18 Eliz. c. 11. § 2. enacts, that all leases to be made by any ecclesiastical or collegiate persons, or others, within the stat. 13 Eliz. c. 10., of any lands, &c. whereof any former lease for years is in being, and not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void. And by the 3d section of 18 Eliz. all bonds and covenants for renewing any leases, contrary to the 18 Eliz. or this statute, are declared void.

44. There are, however, some cases in which a bishop, with the consent of dean and chapter, may make a concurrent lease. 4 Bac. Ab. 64.

45. 4°. The duration of all leases made under these statutes must not exceed twenty-one years, or three lives; but it may be for fewer years or lives. The intention of these statutes being only to abridge the power of making long and unreasonable leases, by reducing them to a determinate number of years or lives, which they should not exceed: but might be made as much under as the party pleased. 1 Inst. 44 *b.*

46. If a bishop makes a lease for four lives, and one of them dies in the lifetime of the bishop, so that at his death there are but three lives in being; yet the lease will be void against his successor. For as it was originally void, no subsequent event could make it good. 10 Rep. 62 *a.*

Baugh v. Haines, Cro. Ja. 76.

47. If a lease be made to A. for the lives of B. C. and D., it is a good lease to one for the lives of three other persons; and a lease to three persons for three lives, is all one, within the intent of these statutes: for in both cases three lives are the measure of the estate created, which is all the statutes require.

8 Rep. 69 *b*. Whitlocke's Case, infra, c. 16. Bac. Ab. v. 4. 69.

48. It appears to be understood, that a lease for sixty years, if three lives shall so long live, is good within the stat. 32 Hen. VIII., upon a principle which will be stated hereafter.

49. By the statute 14 Eliz. c. 11. § 17. it is enacted, that the stat. 13 Eliz. c. 10. shall not extend to leases of houses belonging to any ecclesiastical persons, or bodies politic or corporate, situated in any city, borough, town corporate, or market town, or the suburbs thereof; but that all such houses may be granted and demised as they might have been before the making of that statute, except capital or dwelling houses. But by the 19th section of this act, all leases for more than forty years are prohibited. It has however been held, that covenants for renewing leases of houses in towns, are not prohibited by the 18 Eliz., which only restrains leases made against the stat. 13 Eliz.

Crane v. Taylor, Hob. 269.

1 Inst. 44 *b*. Tit. 28. c. 1.

50. 5°. All leases under these statutes must be of lands or tenements, whereto resort may be had for the rent reserved by distress, otherwise the heirs or successors of the lessors would be without any remedy for the recovery of the rent. These statutes do not therefore extend to advowsons, tithes, or other incorporeal hereditaments. Leases of tithes are now established by a particular statute.

51. 6°. The stat. 32 Hen. VIII. does not extend to any lease of manors, &c. which have not most commonly been letten to farm, or occupied by the farmers

thereof, by the space of 20 years next before such lease thereof made. The intention of this clause was to prevent the persons, enabled by the statute to demise, from making leases of their mansion houses and demesnes, so as to bind their heirs or successors; as that circumstance would have produced a great decay of hospitality.

52. Various opinions have been held upon the construction of this clause. The better of them seems to be, that it consists of two parts in the disjunctive: if either of them be observed, it is sufficient to support the lease. The first is—"which have not most commonly been letten." Which is general. The other is—"or occupied by the farmers thereof by the space of 20 years."—That the most natural and genuine meaning of the clause is, that the lands to be leased must either be such as have been most commonly letten; that is, such as are not reputed part of the demesnes; or such as have been occupied by the farmers thereof by the space of twenty years. Bac. Ab. Tit. Lease, E.

53. If lands have been let or occupied for eleven years, or more, at one or several times, within the twenty years next before a lease for 21 years, or three lives, it will be sufficient: and a demise by copy of court-roll will be considered as a sufficient letting within the statute. Idem. Baugh v. Haines, Cro. Ja. 76.

54. 7°. The statute 32 Hen. VIII. further provides, "That upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the death of the lessors, if no lease had been thereof made, and to whom the reversion thereof should appertain, according to their estates and interests, so much yearly farm or rent, or more, as hath been most accustom-

ably yielden or paid for the manors, &c. so to be letten, within twenty years next before such lease thereof made.

55. By the stat. 18 Eliz. c. 6. it is required, that in all leases made by the Colleges of Oxford, Cambridge, Winchester, and Eaton, one third of the old rent be reserved in corn.

It was formerly doubted whether ecclesiastical persons might make a lease of part of lands, which had been usually let for a certain rent, reserving a rent *pro rata*. But now, by the statute 39 & 40 Geo. III. c. 41., it is enacted, that where any part of the possessions of any ecclesiastical persons shall be demised by several leases, which was formerly demised by one; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts, shall be taken to be the ancient rents; with a proviso, that where the whole of such premises shall be demised in parts, the aggregate rents reserved shall not be less than the old accustomed rent; and so in proportion where a part shall be retained in possession by the lessor.

8°. The last rule to be observed in respect to leases under this statute is, that they must not be made without impeachment of waste. For if, as the preamble speaks, long and unreasonable leases are the chief cause of dilapidations, and of the decay of hospitality, much more would they be so, if they were made dispunishable for waste.

Parsons and Vicars. Bac. Ab. Tit. Lease, F.

56. Parsons and vicars are expressly excepted out of the stat. 32 Hen. VIII., so that they are not, as other sole corporations, enabled by that statute to make any leases to bind their successors; without

the confirmation of the patron and ordinary, but remain as they did at common law. They are, however, not restrained by the stat. 13 Eliz. from making leases for 21 years, or three lives: but then such leases must not only be confirmed by the patron and ordinary, but must also be made in conformity to the eight rules or qualities already mentioned; otherwise they will not bind the successor. And they are restrained by 13 Eliz. from making leases for any longer time: notwithsanding any confirmation or conformity to the rules before mentioned.

57. Tenants for life cannot make leases to continue longer than their own lives. If A., lessee for the life of B. makes a lease for years, by deed indented, and after purchases the reversion in fee. B. dies. A. shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. Tenants for Life. 1 Inst. 47 *b.*

58. Where the person in remainder or reversion joins with the tenant for life in making a lease; it is considered, during the life of the tenant for life, as his lease, and the confirmation of the remainder-man or reversioner. After the death of the tenant for life, it is considered as the lease of the remainder-man or reversioner; and the confirmation of the tenant for life.* 1 Inst. 45 *a.* Treport's Case, 6 Rep. 14.

59. Where tenant in dower, or by the curtesy, makes a lease for years, and dies, the lease is absolutely determined; for though their estates are *quodammodo* a continuance of the estates of the husband and wife, yet it is a continuance only for Tenants in Dower and by the Curtesy.

* Tenants for life are frequently enabled by powers to make leases for long terms; of which an account will be given in Ch. 16. of this Title.

life; they have no power to contract for the inheritance; consequently their leases or charges fall off, with the estate out of which they were derived.

Tenants for Years.

60. As lessees for years may assign or grant over their whole interest, so they may grant it for any fewer number of years than those for which they hold it.

61. By the statute 4 Geo. II. c. 28. § 6. reciting that leases for lives or years could not be renewed, without a surrender of all the underleases derived out of the same; it is enacted, that all future renewals of leases for lives or years shall be deemed good and valid, without the surrender of any derivative leases.

Guardians. Tit. Lease, I. § 9.

62. It is said in Bacon's Ab. that a guardian in socage, having not only an authority, but an interest in the lands descended to his ward, may make leases for years in his own name; for he is *quasi dominus pro tempore*. But it has been determined that such leases become void, as soon as the infant attains his full age.

Roe v. Hodgson, 2 Wils. R. 129. 135.

2 Roll. Ab. 41.

A testamentary guardian, or one appointed pursuant to the statute 12 Cha. II. c. 24. is the same, in office and interest, as a guardian in socage.

Executors and Administrators.

63. As executors and administrators may dispose absolutely of terms for years, vested in them in right of their testators or intestates; so may they lease the same for any fewer number of years: and the rents reserved on such leases will be assets in their hands.

Joint tenants, Coparceners, and Tenants in common. 1 Inst. 186 *a*. Tit. 18. c. 1.

64. Joint tenants, coparceners, and tenants in common may either make leases of their undivided shares; or else may all join in a lease of the whole. One joint tenant, coparcener, or tenant in common may also make a lease of his part to his companion; for this only gives the lessee a right of taking the whole profits, when before he had but a right to the moiety of them, and he may contract with his companion for that purpose, as well as with a stranger.

65. It has been stated, that by the general custom of most manors, copyholders may make leases for one, and sometimes for three years; and that they may, with the lord's licence, make leases for any number of years: but though a lease be made by a copyholder, not warranted by the custom, without licence of the lord, it is not absolutely void; for the lessee may maintain an ejectment against strangers. Copyholders. Tit 10. c. 5. Haddon v. Arrowsmith, Cro. Eliz. 461.

66. All persons incapable of binding themselves by any other contract, such as persons of nonsane memory, &c., are of course incapable of making leases; but it has been stated that the committees of lunatics may now make leases of the lunatic's land, under the direction of the Court of Chancery. Who are incapable of making Leases. ante §

67. An infant cannot make a lease of his lands, unless it be evidently beneficial to him. Where no rent is reserved, it has been held by some to be totally void, while others hold it to be only voidable: it appears however to be settled, that if an infant makes a lease for years, he cannot plead *non est factum*, but must avoid it by pleading the special matter of his infancy; which seems to favour the opinion of those who hold that the lease is not totally void. Infants. Bac. Ab. Tit. Lease, B.

68. If an infant makes a lease reserving rent, it is *prima facie* good; because it is presumed to be for his benefit. But it is voidable by the infant, when he comes of age; or by his heir if he dies under age. If a case of this kind were now to arise, the principle upon which its validity would depend, would be, whether it was beneficial or not to the infant. As Lord Mansfield has observed, that very prejudicial leases may be made, though a nominal rent be reserved: that there may be most beneficial considerations for a lease, though no rent be reserved. And Idem. 3 Burr. 1806.

that an infant may make a lease without rent, for the purpose of trying his title.

Married Women.

69. Married women being disabled by the common law from making any disposition of their real estates during their coverture, cannot make leases: therefore the statute 32 Hen. VIII. enables their husbands to make leases for them.

ante, § 33.

Of void and voidable Leases.

70. There are many cases in which leases made by persons having only a particular estate in the lands, become absolutely void, by the death of the lessor; and others where they are only voidable by the heirs, or persons in remainder or reversion. This distinction is frequently material; for where a lease becomes absolutely void, by the death of the lessor, no acceptance of rent, or any other act by the heir, or person in remainder or reversion, will make it good; whereas if a lease be voidable only, acceptance of rent will operate as a confirmation of it.

1 Inst. 211 *b.*

1 Inst. 45 *b.*

71. All leases by tenants in tail not warranted by the statute 32 Hen. VIII. are voidable by the issue in tail. If the issue accept of rent or fealty after the death of their ancestor; or bring an action for the rent, or for waste, these acts will operate as a confirmation of the lease.

Idem.

72. With respect to leases made by tenants in tail conformable to the statute 32 Hen. VIII., though binding on the issue, they are void, as against the persons in remainder and reversion: so that no acceptance of rent by them will operate as a confirmation. As to leases not conformable to the statute 32 Hen. VIII. they are of course void as to the remainder-man or reversioner.

73. It has been stated that leases made by husband and wife, of the wife's land, though not conformable

to the statute 32 Hen. VIII., are only voidable by the wife; therefore acceptance of rent by her, after her husband's death, will operate as a confirmation. Doe v. Weller 7 Term R. 478. Bac. Ab. Tit. Lease, G.

74. It is said that the lease of the husband alone, of his wife's land, is only voidable by the wife, and not absolutely void. Some doubts are raised respecting this point by the late Mr. Serjeant Williams.* 2 Saund. R. 180. n. 9. Doug. R. 52.

75. All leases made by tenants for life become absolutely void by their death; so that no acceptance of rent, or other act, by the persons entitled to the remainder or reversion, will operate as a confirmation of them.

75. A tenant for life made a lease for 21 years, and died before the expiration of the term. The remainder-man suffered the tenant to continue in possession four or five years, received the rent regularly during that time, then gave him notice to quit, and brought an ejectment. Jenkins v. Church. Cowp. 482.

Lord Mansfield said—This was a void lease; but if it were voidable only, the acceptance of rent alone, unaccompanied with any other circumstance, was not a sufficient confirmation. It could not be a confirmation, unless done with a knowledge of the title at the time; or unless the remainder-man lay by, and suffered the tenant to lay out his money in improvements, in confidence of continuing tenant. But here it was a void lease; and in general a void lease was incapable of confirmation.

76. In a subsequent case Lord Mansfield held that a lease, which was void against a remainder-man, could not be set up by his acceptance of rent, and

* With respect to the cases where leases made by ecclesiastical persons are void, or only voidable, the student is referred to Bacon's Ab. Tit. Lease, H.

suffering the tenant to make improvements, after his interest became vested in possession.

Doe v. Butcher, Doug. 50.

77. A tenant for life made a lease for 99 years, if two persons should so long live. The remainder-man received rent and heriots for several years from the lessee, who laid out considerable sums of money, after the death of the lessor, in improvements. Lord Mansfield said, there did not appear to have been any intention either to confirm the old lease, or to grant a new one: both parties had proceeded under a mistake, and had supposed the original lease to be good. Judgement was given that the lease was not confirmed.

78. The Court of Chancery has however held, that where a remainder-man accepted rent, and suffered the tenant to make improvements, knowing the defect in the lease, he should execute a new lease to him.

Stiles v. Cowper, 3 Atk. 692.

79. A tenant for life made a lease of a house under a power. The lessee assigned over the premises to one Stiles, who rebuilt the house. After the death of the lessor the remainder-man accepted rent during six years, during which time the tenant built new offices. The remainder-man afterwards brought an ejectment against the tenant, and recovered the possession; the lease not being made pursuant to the power. The tenant filed a bill in Chancery for an injunction to stay proceedings at law, and to be quieted in the possession of the house.

Lord Hardwicke said, that where a remainder-man lies by, suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it; these circumstances together would bind him from afterwards controverting the lease. Decreed that the defendant should execute a new lease to the plaintiff.

80. Where there is a proviso inserted in a lease, that upon non-payment of the rent reserved on a certain day, the lease shall be void; if the rent is not paid on the day named, no acceptance of rent after, will operate as a confirmation. 1 Inst. 215 *a*. 3 Rep. 65 *a*.

81. King Philip and Queen Mary demised the seat of the priory of Ravenstone to T. Throckmorton for 70 years, rendering rent, with a proviso, that upon non-payment within 40 days after the day it was due, the lease should be void. The rent was not paid within 40 days in 9 Eliz., but afterwards the Queen's receiver accepted it, made an acquittance, as if it had been paid at the day; and continued to receive it till 30 Eliz., when the Queen granted the land. The non-payment of the rent in 9 Eliz. within the forty days was found by office, upon which the new grantee entered. The case was argued several times in the Exchequer, and all the barons agreed: 1. That the lease became void immediately upon the non-payment of the rent, for the words were, that upon non-payment the lease should cease and be void. So that the land was discharged of the contract, and the patentee was no longer a termor; nor, as Manwood said, a tenant at will or at sufferance. 2. That the acceptance of rent afterwards, could not make a void lease good. Finch v. Throckmorton, Cro. Eliz. 221. Poph. 53.

A writ of error was brought before the Lord Keeper and the Lord Treasurer, where the judgment was affirmed, for this reason, that the proviso should be taken to be a limitation to determine the estate, and not a condition to undo the estate; which could not be defeated, in case of a condition, but by entry.

82. If there be a proviso in a lease, that upon alienation the lessor shall re-enter; there, if the lessor

accepts rent after the breach of the condition, he cannot take advantage of it, unless he was ignorant of such breach; in which case acceptance of rent will not bar him.

Tit. 13. c. 1. § 36.

83. In Pennant's case, the lessee aliened without licence, for which the lessor entered. The lessee said, that before the re-entry, the lessor accepted rent; to which the lessor replied, that before the receipt of rent he had no notice of the alienation. It was adjudged for the plaintiff.

Roe v. Harrison, 2 Term R. 425.

84. But where the lessor has notice of the breach of a condition, and afterwards accepts rent, it will operate as a waiver of the forfeiture, and a confirmation of the lease.

Goodright v. Davids, Cowp. 803.

85. In a lease for 21 years, there was a covenant that the lessee should not underlet, assign, or transfer the premises, without the assent of the lessor: with a power of entry in case the lessee did not observe the covenants. The lessee underlet part of the premises, but with the knowledge of the lessor, who accepted rent accrued after such underletting.

Lord Mansfield said, that to construe the acceptance of rent, due since the condition broken, a waiver of the forfeiture, was to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and did not take advantage of it, but accepted rent, subsequently accrued; that showed he meant the lease should continue. Cases of forfeiture were not favoured at law; and where the forfeiture was once waived, the Court would not assist it.

Who may be Lessees.

86. All persons whatever, though they be idiots, lunatics, infants, or married women, may be lessees; because a lease is always presumed to be beneficial.

Where the lessees labour under any disabilities at the time when the lease is made, they may, upon the removal of their disabilities, avoid such leases; but if they continue to occupy the things demised, after such removal, the lease becomes good.

TITLE XXXII.

DEED.

CHAP. VI.

Of an Exchange, Partition, Release, and Confirmation.

1. *Exchange,*
7. *Must be in Writing, and executed.*
10. *Who may exchange.*
13. *Can only be between two Persons.*
15. *Partition.*
20. *Release.*
23. *Operative Words.*
25. *How Releases enure.*
26. *Mitter L'Estate.*
30. *Mitter Le Droit.*
32. *Enlargement.*
43. *Extinguishment.*
46. *What may be released.*
49. *Confirmation.*

SECTION 1.

Exchange.

AN exchange is a mutual grant of equal interests, the one in consideration of the other; "as if

§ 62. (says Littleton) there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other, in exchange for the land which the other hath; and in like manner the other granteth his land to the first grantee, in exchange for the land which the first grantor hath."

1 Inst. 51 *b*. 2. There are five circumstances necessary to an exchange: 1. That the estates given be equal. 2. That the word *escambium*, exchange, be used; which cannot be supplied by any other word, or described by any circumlocution. 3. That there be an execution by entry or claim in the life of the parties. 4. That if it be of things that lie in grant, it be by deed.

5. That if the lands lie in several counties, it be by deed indented; or if the things lie in grant, though they be in one county.

3. With respect to the first of these circumstances, it is only necessary that the equality be in the quantity of the estates exchanged; as an estate in fee for an estate in fee, an estate for life for an estate for life; and not in the value, quality, or manner of the estate. Therefore an estate in joint tenancy may be exchanged for an estate in common. So lands may be exchanged for rents, commons, or any other inheritance concerning lands. It is said in Bustard's case, that an estate in reversion, expectant on an estate for life, may be given in exchange for land in possession; for in such case the parties are not deceived. 1 Inst. 50 *b*. Lit. § 64, 5. 4 Rep. 122 *b*. Cro. Eliz. 902.

4. An estate tail may be exchanged for an estate in fee; which will continue good, till avoided by the issue in tail. A base fee may be exchanged for an estate in fee simple. 1 Inst. 50 *b*. 1 Roll. Ab. 813.

5. A man may give an estate for life of the donee, in exchange for an estate for another's life; for the estates are equal, both being estates of freehold. Serjeant Roll says, that an estate for three lives may be given in exchange for an estate for one life; for both are estates of freehold, and so equal. Idem.

6. It has been stated, that an exchange between a tenant in tail after possibility of issue extinct, and a bare tenant for life, is good; for, with respect to duration, their estates are equal. Tit. 4.

7. Since the statute of frauds, every exchange must be by deed in writing. It must also be executed in the lifetime of the parties; for as livery of seisin is not necessary, the parties have no freehold in deed, or in law, in them, till entry. Therefore, if both of the parties die before the entry of either, the exchange is Must be in Writing, and executed. Lit. § 62.

void. The heir of one cannot enter and take it as a purchaser, because he is named only to take it by way of limitation of estate, in course of descent. But if one enters, and the other dies before entry, his heir may enter.

1 Rep. 98 *b.* Tit. 29. c. 3.

8. Where an exchange is made by lease and release, this inconvenience is prevented; as the statute of uses executes the possession without entry: and all incidents annexed to an exchange at common law, will be preserved.

9. In every deed of exchange there is an implied warranty, arising from the word *escambium*, of which an account will be given hereafter.

c. 24.

Who may exchange.

10. All persons who are capable of conveying their lands, may of course exchange them with others. If an infant exchanges lands, enters on those taken in exchange, and continues to hold them after he attains his full age, the exchange becomes perfect: for it was not originally void, because the entry of the infant was equivalent to livery; as well as in respect to the recompence; but only voidable.

1 Inst. 50 *b.* 51 *b.*

Anon. 1 Leon. 285. Tit. 35. c. 10.

11. If husband and wife exchange the lands of the wife, for other lands; the wife may, after her husband's death, avoid the exchange, though she should join with her husband in a fine of the lands taken in exchange. But if the wife agrees to the exchange, after her husband's death, she can never avoid it.

Further's Case, Noy 5. ante, c. 2. § 10.

12. After the statutes 1 and 13 Eliz., no exchange of lands belonging to the church, by an ecclesiastic, bound the successor, though a full equivalent were given. But now it is otherwise.

Can only be between Two Persons. 1 Inst. 50 *b.* n. 1.

13. Littleton speaks of an exchange as of a transaction between two persons; and Mr. Hargrave says it was held in a late case, that an exchange, in the

strict legal sense of the word, could not be between three persons, the principle of it not being applicable to more than two distinct contracting parties; for want of the mutuality and reciprocity on which its operation so entirely depends. For, first, the consideration of an exchange, and the implied warranty incident to it, is the receiving something with warranty from the same person, to whom something with warranty is given: but if there could be three distinct parties, each would give to one, and receive from another. Secondly, the implied condition of re-entry is, that it may be made on him whose title fails: but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title, as well as of his own.

Prov. of Eton v. E. Winton, 3 Wils. 389.

14. Although there cannot be more than two distinct parties to an exchange, yet there may be more than two persons. Thus an exchange between two joint tenants, and two tenants in common, is good; for although four persons are named, yet they constitute only two distinct parties. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange, as to make only two distinct relative parties.

1 Inst. 51 a. n. 1.

15. It has been stated that joint tenants, coparceners, and tenants in common, may make a voluntary partition of their estates. The instrument to effect this is called a deed of partition, by which the lands are divided into distinct portions, and allotted to the several parties, who take them in severalty. In the old deeds of partition, it was merely agreed that one should enjoy a particular part, and the other, another part, in severalty; but now it is usual for all the parties mutually to convey and assure to each

Partition. Tit. 18, 19, 20.

other the different estates which they are to take in severalty, under the partition.

16. By the common law, coparceners, being compellable to make partition, might have done it by parol only; but joint tenants, and tenants in common must have done it by deed. The statute of frauds has abolished this distinction, and made a deed equally necessary in all cases.

ante, c. 3. § 1.

17. Every partition between coparceners has annexed to it a warranty in law. In all other deeds of partition there is no implied warranty: but it is usual to insert mutual covenants for the title.

infra, c. 24.

18. An agreement by the husbands of two joint tenants to make a partition, and a partition made under such agreement, will not bind the inheritance of the wives.

Vide Ireland v. Rittle, Tit. 18. c. 2. §

19. It has been stated, that an agreement to make a partition will operate in equity as a severance of an estate in joint tenancy.

Idem,

Release.

20. By the common law, where a man had the actual possession and right of property in lands, he could only convey them by feoffment with livery. As it frequently happened that the actual possession was in one person, and the right of possession, or right of property, in another; in case the person who had the right of possession, or right of property, was willing to convey those rights to the person who had the actual possession, it was done by a discharge of his right to the person in possession, which species of conveyance acquired the name of a release. A feoffment would, in such case, have been useless; because it could not transfer the possession, as the person was in possession already.

Gilb. Ten. 53.

21. A release is therefore a conveyance of a right, to a person in possession. Thus, where a man was disseised, the disseisor acquired the possession; and the right of possession and property remained in the disseisee. Now if the disseisee agreed to transfer his rights to the disseisor, the proper mode of carrying such an agreement into execution was by a release; for the disseisor being already in possession, it would have been useless to have made him a feoffment. Idem. Tit. 29. c. 1.

22. A release is also the giving or discharging of a right of action, which a man hath, or may claim against another. 1 Inst. 264 *a*.

23. The operative words of a release are, *remisisse, relaxasse, et quietum clamasse;* remise, release, and for ever quit claim. Besides which, there are other, words such as, *renuntiare, acquietare.* Where a lessor granted to a lessee for life that he should be discharged the rent, this was held to amount to a release. Operative Words. 1 Inst. 264 *b*.

24. Littleton says, a release of all demands is the best and strongest release. Lord Coke observes, that the word demand is the strongest word in the law, except the word claim; that a release of all demands discharges all sorts of actions, rights, and titles, conditions, before and after breach, executions, appeals, rents of all kind, covenants, contracts, recognizances, statutes, &c. § 508. 1 Inst. 291 *b*.

25. Releases of land, in respect to their operation, are divided into four sorts. 1. Releases that enure by way of *mitter l'estate* 2. Releases that enure by way of *mitter le droit.* 3. Releases that enure by enlargement; and 4. Releases that enure by extinguishment. How Releases enure.

26. When two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or coparceners, and one of Mitter L'Estate. Lit. § 304. 1 Inst. 273 *b*. Gilb. Ten. 72.

them releases his right to the other, such release is said to enure by way of *mitter l'estate*. For where two several persons come in by the same feudal contract, one of them may discharge to the other, the benefit of such contract, by a release; because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus two coparceners come into one entire feud, descending from their ancestor; they may therefore release privately to each other, because they take by the former descent, which established them in possession without notoriety. But since coparceners do also transmit distinct estates to their children, they may pass their estates by distinct feoffments.

Gilb. Id. 27. As to joint tenants; they can only pass their estates to one another by release; for they all come in by the first feudal contract, and therefore a second feoffment cannot give any farther title, or notoriety; because every person is supposed to be in by his elder title; which in the case of joint tenants is the original feoffment; so that a second feoffment would be useless.

1 Inst. 273 *b*. 28. In consequence of the privity which must necessarily exist in releases that enure by way of *mitter l'estate*, a fee will pass by such a release, without any words of limitation. For the parties are not in by the release, but by the original feudal contract, which passed an inheritance; and the release only discharges the pretensions of one of them to the other. So that where one joint tenant or coparcener releases to the other, the releasee is in by the original conveyance; and such release is not considered as an alienation.

29. One tenant in common cannot release to his companion, because they have distinct freeholds;

but they must pass their estates by feoffment. For as they were created by different acts, and different liveries, they must also pass to each other by distinct liveries.

30. Releases are said to enure by way of *mitter le droit*, where a person who has been disseised, releases to the disseisor, or to the heir or feoffee of the disseisor; who being in possession, is therefore capable of taking a release of the right; as in cases of this kind nothing but the bare right passes, the release is said to enure by way of *mitter le droit*. Mitter le Droit. Lit. § 466. Gilb. Ten. 55.

31. No words of limitation are necessary in a release of this kind: for if a release of right be made to a person seised in fee, for a day or an hour, it will be as strong as if it were made to the releasee and his heirs for ever. Lit. § 467.

32. Releases enure by way of enlargement of estate, when the possession and inheritance are separated for a particular time; and he who has the reversion and inheritance, releases all his right and interest in the lands, to the person who has the particular estate. Such releases are said to enure by way of enlargement of estate; and to amount to a grant and attornment: because they transfer the legal estate to the releasee, as effectually as a feoffment with livery. Enlargement. Lit. § 465. 1 Inst. 272 *b*.

33. To render this release good, it is necessary that there should be a privity of estate between the releasor and the releasee; and also that the releasee should have such an estate as is capable of being enlarged.

34. With respect to privity of estate, if a person makes a lease for years, the lessee is of course capable of taking a release from the lessor, because there is a privity between them. It should however be observed, that in this case the lessee must have en- 1 Inst. 273 *a*. Lit. § 459. 1 Inst. 270 *a*.

tered on the lands before the execution of the release; for till entry he has only an *interesse termini*, which is not capable of being enlarged.

Tit. 8. c. 1.

1 Inst. 270 *b*.

35. But if a man makes a lease for life, remainder for life, and the first lessee dies, a release to him in remainder is good before he enters, to enlarge his estate.

1 Inst. 273 *a*.

36. If A. makes a lease to B. for life, and the lessee makes a lease for years, and afterwards A. releases to the lessee for years; it will not enlarge his estate, because there is no privity between A. and the lessee for years. So if a person makes a lease for 20 years, and the lessee makes a lease for 10 years, if the first lessor releases to the second lessee, his release will be void, for want of privity of estate.

Lit. § 460.
1 Inst. 270 *b*.

37. A release to a tenant at will operates so as to enlarge his estate, because there is a privity between him and the lessor. But a release to a tenant at sufferance is void, for want of privity.

Lit. § 462, &c.
1 Inst. 271 *a*.

38. A release to a *cestui que use* by the feoffees to uses was sufficient to enlarge his estate; because the *cestui que use* was tenant at will to the feoffees, and there was a privity between them. From which it may be concluded that a release to a *cestui que trust*, by the trustee, would now operate to enlarge the estate.

1 Inst. 270 *b*.
Tit. 14.

39. A release to a person having an estate by statute merchant, statute staple, or *elegit*, will operate to enlarge their estates.

1 Inst. 273 *b*.

40. If a feme covert be tenant for life, a release to her husband will be good; because there is both privity, and an estate in the husband, whereupon the release may enure: for by the marriage, the husband acquired a freehold estate in right of his wife.

1 Inst. 270. *a*. n. 3.

41. Lord Coke says, a release which enures by way of enlargement, cannot operate without a posses-

sion. This must be understood to mean, not that an actual possession is necessary, but that the releasee has an estate actually vested in him at the time of the release, which is capable of being enlarged by such release. Thus, if a tenant for twenty years makes a lease to B. for five years, and B. enters, a release to the first lessee is good, for the possession of his lessee was his possession. So if a man makes a lease for years, remainder for years, and the first lessee enters, a release to the person in remainder for years is good, to enlarge his estate.

42. Releases which operate by enlargement of estate, require the same technical words of limitation as feoffments or grants. Thus, if a lessor releases to his lessee for years all his right in the lands, this will only pass an estate for life. Lit. § 465.

43. In some cases where the release cannot enure by way of *mitter le droit*, it will operate by way of extinguishment. Thus, if a lord releases his seigniory to the tenant, or if a person having a rent or common, releases it to the terre-tenant, these releases are said to operate by way of extinguishment; because the tenant cannot have services or rent to receive of himself; nor can he take common in his own land. Extinguishment. Lit. § 479,80. 1 Inst. 280 *a*.

44. If a lease for years be made to commence presently, reserving rent; and before the lessee enters, the lessor releases to him all his right in the land; though this cannot enure to enlarge his estate, yet it will operate as an extinguishment of the rent. 1 Inst. 270 *a*. ante, § 34.

45. Littleton says, if a tenant for life lets the land over to another, for term of the life of the lessee, remainder over to another in fee, and the lessor, or owner of the inheritance, releases to the person to whom the tenant made the lease, he will be thereby § 470.

for ever barred, though no mention is made of his heirs; for at the time of the release the lessor had no reversion, but only a right to have the reversion. Lord Coke, in his comment on this passage, observes, that the release to the lessee does not enure by way of *mitter le droit*, for then should he have the whole right; but by way of extinguishment, in respect of him who made the release; and that it shall enure to him in remainder.

What may be released.

46. Not only estates in land, but all interests, rights, and profits arising out of land, or annexed thereto, may be released. It is however a rule of law, that no possibility, right, title, or thing in action, shall be granted or assigned to a stranger; for that would be the occasion of multiplying suits. Thus Lord C. B. Gilbert says, "A release of all a man's right supposeth that he has a right; for he cannot transfer a right which he has not: if he has nothing, nothing can pass by the conveyance: and it countenanced maintenance to transfer possibilites." Hence a son cannot release to his father's disseisor, in the lifetime of his father, because he has no right to the land then. And in such a case, the son might enter on the land, against his own release.

Lampet's Case, 10 Rep. 46.

Ten. 53.

Lit. § 446.

1 Inst. 265 *a*.

10 Rep. 48 *a*. & *b*.

47. All rights, titles, and actions, may however be released to the terre-tenant, for securing his repose and quiet, and for avoiding suits. Therefore a right or title to an estate of freehold, in *præsenti* or *futuro*, may be released in five ways. 1. To the tenant of the freehold in fact, or in law, without any privity. 2. To the person in remainder. 3. To the person entitled to the reversion, without any privity. 4. To the person who has a right only in respect of privity: as if the tenant be disseised, the lord may release his services, in respect of the privity and right, without

any estate. 5. In respect to privity only, without right: as if tenant in tail makes a feoffment in fee, the donee, after the feoffment, has no right; yet in respect of the privity only, the donor may release to him the rent, and all services, saving fealty.

48. A bare authority cannot be released, nor a power collateral to the land. infra, c. 18.

Confirmation.

49. A confirmation is of a nature nearly similar to a release. Lord Coke defines it to be—"A conveyance of an estate or right in *esse*, whereby a voidable estate is made sure and unavoidable; or where a particular estate is increased." 1 Inst. 295 *b.* Gilb. Ten. 75.

50. The first part of this definition may be illustrated by the following case put by Littleton. Where a person lets land to another for term of his life, who lets the same to another for term of 40 years, by force of which he is in possession; if the lessor for life confirms the estate of the tenant for years, by deed, and afterwards the tenant for life dies, during the term; this deed will operate as a confirmation of the term for years. § 516.

51. As to the latter branch of the definition; whenever a confirmation operates by way of increasing the estate, it is similar in every respect to a release that operates by way of enlargement, for there must be privity of estate, and proper words of limitation. Thus in the case put by Littleton, it is said that if the lessor for life had released to the tenant for years, in the lifetime of the tenant for life, the release would have been void, for want of privity between the lessor for life, and the tenant for years. Lit. § 517.

52. The proper technical words of a confirmation are, ratify, approve, and confirm. But Littleton § 531.

says, that the word *dedi*, or the word *concessi*, have the same effect in substance, and shall enure to the same
9 Rep. 142 *a.* intent, as the word *confirmavi*. Thus if a disseisee conveys to the disseisor by the words *dedi* or *concessi*, it will operate as a confirmation.

Lit § 519, 20. 53. No words of limitation are necessary in the case of a disseisin; a confirmation by the disseisee to the disseisor, of his estate, would give him a fee simple without the word heirs; it would be the same if the estate of the disseisee had been confirmed for a day or an hour only.

1 Inst. 297 *a.* 54. If a disseisor makes a lease for 100 years, the disseisee may confirm parcel of those years, but then it must be by apt words; for he must not confirm the lease or demise, or the estate of the lessee, for then the addition, for parcel of the term, would be repugnant, when the whole was confirmed before; but the confirmation must be of the land, for part of the term. So may the confirmation be of part of the land: as if it be for 40 acres, he may confirm 20, &c. But an estate of freehold cannot be confirmed for part of the estate, for that the estate is entire, and not several, as years are.

524. 55. Littleton says, if a man lets land to another for life, and after confirms his estate which he hath in the same land, to hold his estate to him and his heirs, this confirmation to his heirs, is void; for his heirs cannot have his estate, which was but for term of his life. If he confirms his estate by these words, to have the same land to him and his heirs, this confirmation will give him an estate in fee simple; because it applies to the land, and not to the estate in the land.

56. A confirmation does not strengthen a void estate. *Confirmatio est nulla, ubi donum precedens est invalidum, et ubi donatio nulla est, nec valebit confirmatio.* For a confirmation may make a voidable or defeazible estate good; but cannot work upon an estate that is void in law. 1 Inst. 295 *b.*

TITLE XXXII.

DEED.

CHAPTER VII.

Of a Surrender, Assignment, and Defeazance.

1. *Surrender.*
5. *Must be by Deed or Note in Writing.*
6. *Who may surrender.*
7. *What Estate necessary.*
13. *Assignment.*
20. *Must be by Deed or Note in Writing.*
21. *What may be assigned.*
25. *Defeazance.*

SECTION 1.

Surrender.

A SURRENDER, *sursum redditio*, is of a nature directly opposite to a release: for as that operates by the greater estate descending upon the less; a surrender is the falling of a less estate into a greater, by deed. Lord Coke defines it to be a yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown, by mutual agreement between them.

1 Inst. 337 *b*.

Thompson v. Leach, 2 Salk. 618. Show. Parl. Ca. 150.

2. A surrender immediately devests the estate out of the surrenderor, and vests it in the surenderee; for this is a conveyance at common law, to the perfection of which no other act but the bare grant is necessary. And though it be true that every grant is a contract, and there must be *actus contra actum*, or a mutual consent, yet that consent is implied; for a gift imports a benefit, and an *assumpsit* to take a benefit may well be presumed.

ante, c. 1. § 29.

3. Though an estate once surrendered is merged and destroyed, as between the surrenderor and surrenderee; yet it is not so as to strangers, whose rights are preserved. Thus if a tenant for life grants a rent-charge, and after surrenders his estate, the rent-charge shall continue. So if a lessee for life makes a lease for years, rendering rent, and afterwards surrenders his estate, the lease for years shall continue, but the surrenderee will not have the rent upon the lease for years. Touch. 301.

4. The technical and proper words of this conveyance are, surrender and yield up; but any form of words by which the intention of the parties is sufficiently manifested, will operate as a surrender. Thus if a lessee for years remise, release, discharge, and for ever quit claim his lessor, all his right, title, or interest in or to such lands; it will amount to a surrender. So if a lessee for life leases to the lessor, for the life of the lessee, this is a surrender. Perk. § 607. Smith v. Mappleback, 1 Term R. 441.

5. Formerly a surrender of lands might have been made without deed or livery; but as to things that lay in grant, whereof a particular estate could not commence without deed, they could only be surrendered by deed. An estate by the curtesy or in dower in an advowson or rent, though it began without deed, could not be surrendered without deed. So if a lease for life were made of lands, remainder for life; though the remainder began without deed, yet because remainders and reversions lie in grant, the remainder could not be surrendered without deed. Must be by Deed or Note in Writing. 1 Inst. 338. *a.*

6. A deed is still necessary to create a surrender in all cases where it was formerly required. And now, by the statute of frauds, no surrender is valid, unless it be by deed or note in writing signed by the party so ante, c. 3. § 2.

Farmer v. Rogers, 2 Wils. R. 27.

surrendering, or their agents, thereunto lawfully authorized by writing, or by act and operation of law.

Maginis v. Macullock, Gilb. R. 236.

7. It was held by Lord C. B. Gilbert, that upon the true construction of this statute, a lease for years could not be surrendered by cancelling the indenture; because the intent of the statute was to take away the manner they formerly had of transferring interests in lands by signs, symbols, and words only. Therefore, as livery of seisin on a parol feoffment, was a sign of passing the freehold, before the statute, but is now taken away by the statute; so the cancelling of a lease was a sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party. The words, "by act and operation of law," were to be construed a surrender in law, by the taking a new lease, which being in writing, was of equal notorietywith a surrender in writing.

Roe v. Archb. of York, 6 East, 86.

Who may surrender.

8. All persons capable of alienating lands, may surrender any particular interest therein. By the statute 29 Geo. II. c. 31. it is enacted, that in all cases where any person under the age of 21 years, or any lunatic or feme covert, shall become interested in, or entitled to any lease or leases for life or years; it shall and may be lawful for such person under the age of 21 years, or for his or her guardian or guardians, or other person or persons, on his or their behalf; and for such lunatic, or his or her guardian or guardians, committee or committees of the estate, or other person on his or her behalf; and for such feme covert, or any other person or persons on her behalf; to apply to the Court of Chancery or Exchequer, the Courts of Equity of the counties palatine of Chester, Lancaster, and Durham, or the Courts

of Great Session of the principality of Wales, respectively, by petition or motion in a summary way; and by the order and direction of the said Courts respectively made, upon hearing all parties concerned, such person under the age of 21 years, and such lunatic, or person or persons appointed by the said Courts respectively, and also such feme coverts, by deed or deeds only, without levying any fine, shall and may be enabled from time to time to surrender such lease or leases, and accept and take in the name and for the benefit of such person under the age of 21 years, or lunatic, or feme covert, one or more new lease or leases of the premises comprised in such lease or leases, surrendered by this act; for and during such number of lives, or for such term or terms of years absolute, as was or were mentioned or contained in such lease or leases so surrendered, at the making thereof respectively, or otherwise as the said Courts shall respectively direct.

What Estate necessary.

9. To make a surrender good, the person who surrenders must be in possession, and the person to whom the surrender is made must have a greater estate, immediately in remainder or reversion, in which the estate surrendered may merge.

Perk. § 599. 600.

10. If a lessee for life or years be ousted by a stranger, and afterwards surrenders to his lessor, it will be void; because he had but a right at the time of the surrender. So if a woman has a title to dower, and surrenders to the person against whom she ought to have dower, it is void for the same reason.

Id. 601.

11. A lease for years to commence at a future day cannot be surrendered, for there is nothing in the lessee, in possession, before the commencement of the lease; nor has the lessor a reversion before that time.

Plowd. 541.

12. To make a surrender good, there must be a privity of estate between the surrenderor and the surrenderee. Thus if a tenant for 30 years makes a lease for 10 years, and the lessor and lessee join in a surrender to the person in reversion in fee, the surrender is good for both the estates; yet the lessee for 10 years could not surrender by himself for want of privity; but when the other joined with him, his surrender shall be taken in law to precede, and the surrender of the lessee for 10 years, to follow; so that the same shall be good.

Cro. Eliz. 156. 12 Mod. 79.

13. An estate at will is not surrenderable, because it is at the will of both parties; and either party may determine his will, without the formality of a surrender.

Hughes v. Robotham, Cro. Eliz. 302. Poph. 31. Bac. Ab. Tit. Lease, § 2.

14. It was formerly doubted whether a lessee for years could surrender to a person who had the reversion only for years; but this point appears to have been settled by a determination in 35 Eliz., in which it was laid down, 1. That if the term in reversion be greater than the term in possession, the lesser will merge in the greater; as ten years may be surrendered and merge in twelve or fourteen years. 2. That though the reversion be for a less number of years, yet the surrender will be good, and the first term merged: as if one were lessee for 20 years, and the reversion expectant thereon was granted to another for a year, who granted it over to the lessee for 20 years, this would operate as a surrender of the 20 years term, as if he had taken a new lease from his lessor for one year: for the reversionary interest coming to the possession, drowns it; and the number of years is not material; for as he may surrender to him who hath the reversion in fee, so he may to him who hath the reversion for any less term. And therefore Popham held,

that where lessee for 20 years makes a lease for 10 years, and the lessee for 10 years surrenders to his lessor, viz. the lessee for 20 years, this is good; and the lessor shall have so many of the years as were then to come of his former term of 20 years; that is, as it seems, so many years as were to come of his reversion shall be now changed into possession. And he held further, that if such lessee for 20 years had made such lease for 10 years, and then granted over the reversion for 10 years only, viz. no longer than the lease for 10 years was to continue, and such lessee for 10 years had attorned, then the grantee of the reversion should have the rent and services, and the grantor the residue of the 20 years. And that the lessee for 10 years might surrender to the grantee of the reversion for 10 years; and he thereby would have the possession for so many years as were then to come of his reversion. And if he had a less term in the reversion, than the lessee himself had in the possession, it should go to the benefit of the first termor for 20 years, who was his grantor: for the term in possession was quite gone, and drowned in the reversion, to the benefit of those who had the reversion thereupon, having regard to their estate in reversion, and not otherwise.

15. An assignment is properly a transfer of some particular estate or interest in lands; but is usually applied to the transfer of a term for years. It differs from a derivative lease only in this circumstance; that by such a lease, the lessor conveys an interest less than his own, reserving to himself a reversion: whereas, in an assignment, the assignor parts with his whole interest in the thing assigned, and puts the assignee in his place. Assignment.

16. Where a person transfers all his term to another, but reserves rent to himself, this is not an assignment, but an underlease.

Pulteney v. Holmes, Stra. 405.

17. A. having a term for years, whereof one year and three quarters was to come, agreed with B. that he should have the premises for the remainder of the term, paying the same rent to A. as was reserved upon the original lease. It was held, that this was an underlease, and not an assignment.

Palmer v. Edwards, Doug. 187. *n.*

18. The proper technical words of an assignment are, assign, transfer, and set over. But the words give, grant, bargain, and sell; or any other words which show the intent of the parties to make a complete transfer, will amount to an assignment.

1 Mod. 263.

19. No consideration is necessary to support an assignment of a term for years; for the tenure, attendance, and subjection to forfeiture, as also the payment of the rent, if there be any, is sufficient to vest the term in the assignee.

Must be by Deed or Note in Writing. ante, c. 3. § 2. Hodges v. Drakeford, 1 Bos. & Pull. *n. s.* 270.

20. Previous to the statute of frauds and perjuries, all chattels real might have been assigned by parol only. But it is enacted by the statute, that all assignments of leases or terms for years shall be by deed or note in writing, signed by the party assigning, or his agent, thereunto lawfully authorized by writing.

What may be assigned. Perk. § 91. 1 Inst. 46 *b.*

21. Every estate and interest in lands and tenements may be assigned; as also every present and certain estate or interest in incorporeal hereditaments; such as rents, advowsons, &c. Even though the interest be future, as a term for years to commence at a subsequent period, yet it may be assigned; for the interest is vested *in præsenti*, though only to take effect *in futuro*.

22. It should however be observed, that no right of entry or re-entry can be assigned; so that if a person be disseised, and afterwards assign over his right to another, before he has entered on the disseisor, such assignment is void. Lord Coke says, this doctrine is founded on a principle of the common law, that nothing in action, entry, or re-entry, can be granted over. For, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed. But *choses* in action are assignable in equity, as will be shown in the next chapter. Lit. § 347. 1 Inst. 214 *a.*

23. A naked power is not assignable: where it is coupled with an interest, it may be assigned; as where a lease was made, with power to the lessor, his heirs and assigns, to cut down and sell trees; this power was held to be assignable. Warren v. Arthur, 2 Mod. 317.

24. It is said by Mr. Fearne that an assignment of a contingent interest, even in lands of inheritance, for a valuable consideration, may be carried into execution by the Court of Chancery; upon the ground of its being such a contract or agreement as the Court may think fit to decree a specific performance of. Ex. Dev. 527.

25. A defeazance is a collateral deed, made at the same time with a feoffment or grant, containing certain conditions, upon the performance of which the estate created by such feoffment or grant may be defeated. The word is derived from the French word *defaire*, to defeat or undo, *infectum reddere quod factum est.* A defeazance, executed at the same time with a feoffment, was considered as a part of it, and therefore allowed; but no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, was formerly permitted. Defeazance. 1 Inst. 236 *b.* Tit. 13. c. 1. § 10.

1 Inst. 237 *a.* 26. As to things that were merely executory, or to be completed by matter subsequent, as rents, conditions, warranties, &c., they were always liable to be avoided by a defeazance, made subsequent to the time of their creation.

Tit. 13. § 1. 27. The difference between a defeazance and a condition is, that a condition is inserted in the deed by which the estate is created. A defeazance is a separate deed, executed at the same time with the original deed.

Touch. 397. 28. A defeazance must be made *in eodem modo*, and by matter as high as the thing to be defeated: so that if the one be by deed, the other must be so also. Where the defeazance recites the deed which it is meant to defeat, as it always does, it must recite it truly.

TITLE XXXII.

DEED.

CHAP. VIII.

Of a Bond and Recognizance.

1. *A Bond.*
8. *Its Effect as to the Obligor.*
10. *As to his Heir.*
13. *As to a Devisee.*
14. *Where the Remedy may exceed the Penalty.*
16. *Bonds to the King.*
19. *Recognizance.*
21. *Effect of.*
26. *Bonds and Recognizances are assignable.*
29. *Defeazance of a Bond, &c.*

Section 1.

A BOND or obligation is a deed-poll whereby the obligor binds or obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to the obligee, on a particular day. If this be all, the bond is called a simple one, *simplex obligatio*. But there is generally a condition added, that if the obligor does some act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money, borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified in the bond. A Bond. 1 Inst. 172 *a*.

2. There are only three things essentially necessary to a bond, writing, sealing, and delivery. For as to signing, that circumstance was clearly not necessary in former times; and the statute of frauds does not extend to bonds. 2 Salk. 462.

3. No particular form of words is required to constitute a bond; any words which shew the intention Cro. Eliz. 561. 729, 886.

of the party to bind himself, will be sufficient; for such obligation is only in the nature of a contract, or a security for the performance of a contract, which is construed according to the intention of the parties. If there be an omission of the usual conclusion of a condition; namely, that then the obligation shall be void; yet the condition is good; and it is a good defeazance of the bond. For insensible and repugnant words shall be rejected.

1 Saund. R. 66. n. 1.

Butler v. Wigge, 1 Saund. 66.

4. It has also been held, that any words by which the intention of the parties can be discovered, are sufficient to make a condition of a bond. For if the words, though improper, should be construed void, and not a condition, then the obligation would be single, and of force against the obligor, though he had performed the condition of it, according to the intention of the parties. And the condition, being for the benefit of the obligor, shall be construed favourably.

5. Mr Serjeant Williams, in his note on this case case, says—"With respect to impossible or void conditions, the following distinction has been taken; that where the condition is underwritten or indorsed, *that* is only void, and the obligation is single. But where the condition is part of the lien itself, and incorporated therewith, (as in a recognizance by bail) if the condition be impossible, the obligation is void."

Pullerton v. Agnew, 1 Salk. 172.

Idem.

6. Where the condition of a bond is entire, and the whole is against law, it is void. But where the condition consists of several different parts, some of which are lawful, and others not, it is good for so much as is lawful, and void for the rest. If a bond is given with a condition to do a thing against an act of parliament, and also to pay a just debt,

the whole bond is void, because the letter of the statute makes it void, and it is a strict law.

7. This security is called a specialty, the debt being therein particularly specified in writing. The party's seal acknowledging the debt or duty, and confirming the contract, renders it a security of a higher nature than those entered into without the solemnity of a seal. Hence bond debts are preferred to those due on simple contract.

8. When the condition of a bond is not performed, it becomes forfeited and absolute in law; and is a charge on the personal estate and chattels real of the obligor, but not on his freehold lands; therefore any settlement or disposition which he makes in his life-time of his freehold estates, whether voluntary or not, will be good against bond creditors. For a bond being no lien whatever upon lands, in the hands of the obligor, much less can it be so, when those lands are disposed of to a stranger. Its Effect as to the Obligor. Treat of Eq. B. 1. c. 4. § 14.

9. A purchaser for a valuable consideration is not affected by notice of a bond debt; for he is to look no farther than his title; and the bond debt is no part of the title, till it is placed on the land by a judgment. Gilb. Lex Præt. 293. Treat. of Eq. B. 1. c. 4. § 12.

10. If the obligor binds himself and his heirs in a bond, it will be then a lien on all the freehold estates whereof he dies seised, and will bind his heirs; who, in default of personal assets, will be bound to discharge it out of the real assets of the obligor. So that a bond is a collateral, though not a direct charge on lands. As to his Heir. Tit. 1. §. 57.

11. It has been stated that reversions, after estates for years, are immediate assets. and reversions after estates for life are *quasi* assets; in both which cases they are liable to the payment of bond debts: that Tit. 17. § 22. &c.

reversions expectant on estates tail are assets when they fall into possession; in which case they are liable to the bond debts of the person who was the original donee of the reversion, and to whom the person claiming such reversion must make himself heir; but not to the bond debts of any intermediate heirs, who were entitled to such reversion.

Tit. 1. § 58.

12. It has been also stated, that by the stat. 3 William and Mary, c. 14. the heir of a person indebted by bond is answerable, though he aliens the estate.

As to a Devisee.

13. By the same statute, § 2 & 3, all devises of lands are declared to be fraudulent and void, as against bond creditors: an estate in reversion is within this act. A devise of such a reversion by the heir of the obligor is also within this statute; and in such a case, the lands devised are liable.

Tit. 38. c. 1.

Kynaston v. Clarke, Tit. 17. § 30.

Where the Remedy may exceed the Penalty.

14. When a bond was forfeited, the penalty became the legal debt, and there was no relief given against it, but by a court of equity; where the obligee is only allowed to recover his principal, interest, and costs. But now, by the stat. 4 Ann. c. 16. § 12. payment of the principal, interest, and costs is good at law.

Wilde v. Clarkson, 6 Term R. 303.

15. Although at law there can in general be no remedy beyond the penalty, because in that the obligee seems to have taken his security; yet as it is on the foundation of doing equal justice to both parties that equity proceeds, it will, on any application for a favour from the obligor, compel him to pay the principal, interest, and costs, though exceeding the penalty.

3 Bro. Rep. 492. 525.

Bonds to the King.

16. By the stat. 33 Hen. VIII. c. 39. § 2. it is enacted, that all obligations and specialties concerning the king and his heirs, or made to his or their use,

shall be made to his Highness and to his heirs, kings, in his or their name or names, by these words, *domino regi*, and to no other person to his use; and to be paid to his Highness by these words, *solvend.* "*eidem domino regi hæred.*" *vel executoribus suis*, with other words used in common obligations; which obligations and specialties shall be in the nature of a statute staple. Jenk. 226.

17. It has been long settled, that a bond for performance of covenants is within this statute. In a modern case it was held, that a bond taken to the king, his heirs and successors, was within this statute; the words *domino regi hæredibus et successoribus suis*, being only directory. But where a bond is not originally made to the king's use, but comes to him by assignment, or forfeiture; it is not within the first part of this act. 7 Rep. 20 *b.* Rex v. Yale, Bunb. 58.

18. By the 27th section of this law it is enacted, that the king shall not be excluded from demanding his just debts, against any of his subjects, as heir or heirs to any person or persons indebted to the king, or to other persons to his use; albeit the word heir be not comprised in such recognizance, obligation, or specialty.

19. It has been stated that a recognizance is a bond acknowledged in the Court of K. B. or C. P., or before the mayor of the staple at Westminster, or the recorder of London; and the several circumstances required to render it a lien upon lands are there mentioned. It is in most respects similar to a bond; the difference being chiefly, that a bond is the creation of a new debt; whereas a recognizance is the acknowledgement upon record of a former debt. Recognizance. Tit. 14. § 13.

20. The form of a recognizance is thus—"That A. B. doth acknowledge to owe to our sovereign lord the king, or to C. D., the sum of £100," with condition to be void on performance of the thing stipulated. This being either certified to, or taken by the officer of some court, it is witnessed only by that officer, not by the party's seal. So that it is not, in strict propriety, a deed: though the effects of it are greater than those of a common bond; being allowed a priority in point of payment.

Effect of.

21. A recognizance is a lien on all the lands which the cognizor had at the time of its acknowledgement; and also upon all those which he afterwards acquires. So that no alienation by the cognizor, will prevent the cognizee from extending the land.

22. A recognizance is also a lien on all the lands whereof the cognizor died seised, in the possession of his heir or devisee. Where an estate in reversion, expectant on an estate tail, falls into possession, it then becomes liable to the recognizances, not only of the original donor, but also of all the intermediate heirs, who were entitled to such reversion: because it is a direct lien on lands; in which respect it differs from a bond.

Tit. 17. § 27.

23. Whenever the cognizee appears in court and admits satisfaction, the recognizance is discharged and vacated on the roll.

24. A recognizance not enrolled will be considered as a bond, being sealed and acknowledged; and must be paid as a debt by specialty.

Bothomly v. Fairfax, 1 P. Wms. 334.

25. There are two other kinds of recognizances of a private sort, which are said to be in the nature of a statute merchant, and statute staple, of which an account has been already given.

Tit. 14. § 13.

Bonds and Recognizances are assignable.

26. It has been stated, that by the rules of the common law no right of action is assignable. But in modern times, bonds, recognizances, and judgements obtained in actions of debt, or acknowledged under a warrant of attorney, are constantly assigned, though in compliance with the ancient principle, the form of assignment of a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to use the name of the assignor, in order to recover the thing assigned. Therefore when a bond, recognizance, or judgement is assigned, it must still be sued for in the name of the original obligee or cognizee: the person to whom it is transferred being rather an attorney, than an assignee. Our courts of equity, considering that in a commercial country much property must lie in contract, will protect the assignment of *chose* in action, as much as the courts of law will that of a *chose* in possession.

2 Comm. 442.

3 P. Wms. 199.

Dyer, 30 *b.* Pl. 208.

27. The king is an exception to this rule, for he might always either grant or receive a *chose* in action by assignment.

1 Ab. Eq. 44. 2 Vern. 692. 765.

28. An assignee of a *chose* in action takes it subject to all the equity to which it was liable in the hands of the original party.

Defeazance of a Bond, &c.

2 Comm. 342.

29. A defeazance on a bond, or recognizance, or judgement recovered, is a condition, which, when performed, defeats, or undoes it, in the same manner as a defeazance of an estate. It differs only from the common condition of a bond in this, that the one is always inserted in the bond or recognizance; the other is made between the same parties, by a separate, and frequently a subsequent deed. This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor or cognizor.

1 Inst. 237 *a.* Fowell v. Forest, 2 Saund. 47. *n.* 1.

TITLE XXXII.

DEED.

CHAP. IX.

Of a Bargain and Sale.

1. *Deeds derived from the Statute of Uses.*
4. *Bargain and Sale.*
12. *Who may convey by.*
17. *What may be conveyed by.*
22. *Requires a pecuniary Consideration.*
30. *A Rent may be reserved.*
31. *Must be enrolled.*
37. *Exceptions. Lands in Cities.*
38. *And Terms for Years.*
39. *Relation of the Enrolment.*

Section 1.

Deeds derived from the Statute of Uses.

HAVING treated of the several kinds of deeds which derive their effect from the common law; we now come to explain the nature and operation of those conveyances which derive their effect from the statute of uses.

Tit. 11. c. 4. § 9.

2. It has been stated that the statute of uses has given rise to several new sorts of conveyances, which operate contrary to the rules of the common law. It being settled, that whenever a use was well raised in any person, the statute immediately transferred the possession to him, without entry or claim, or even assent; and the possession thus transferred was not a mere seisin or possession in law, but an actual seisin and possession in fact; not a mere title to enter on the land, but an actual estate.

Tit. 11. c. 3. § 40.

3. Conveyances derived from the statute of uses are of two kinds: First, where the deed only transfers the use, which is said to operate without any

transmutation of possession; because the alteration of the legal seisin and possession is effected by the mere operation of the statute. Secondly, where the legal estate is transferred by a common law assurance, and a use is declared on such assurance. This is said to operate by transmutation of possession, because the legal seisin is first transferred by a common law assurance.

Bargain and Sale.

4. The first deed which operates without transmutation of possession is a bargain and sale; which was well known and often used before the statute of uses; it being then a common practice for a person who was seised of lands, to bargain and sell them to another; in which case, if the consideration was sufficient to raise a use, the bargainor became immediately seised to the use of the bargainee. All which might have been transacted without the formality of a deed.

Plowd. 303. 8 Rep. 94 *a.*

2 Inst. 671.

5. A bargain and sale is therefore a contract by which a person conveys his lands to another, for a pecuniary consideration, in consequence of which a use arises to the bargainee; and the statute 27 Hen. VIII. immediately transfers the legal estate and possession to the bargainee. A bargain and sale may be in fee, for life, or for years.

2 Inst. 671.

6. The proper and technical words of this conveyance are, bargain and sell; but any other words that would have been sufficient to raise a use, upon a valuable consideration, before the statute, are now sufficient to constitute a good bargain and sale. Proper words of limitation must however be inserted.

8 Rep. 94 *a.* Grey v. Edwards, 4 Leon. 110.

7. Thus if a man, for money, aliens and grants lands to one and his heirs, or the heirs of his body, or for life, by deed indented and enrolled, it will amount to a bargain and sale.

Idem.

8. So if a person covenants, in consideration of money, to stand seised to the use of his son, in fee; if the deed be enrolled, it will be a good bargain and sale, though the words, bargain and sell be not used.

Fox's Case, 8 Rep. 93.

9. E. Fox demised lands to G. S. and others, for three lives, reserving rent. Afterwards, by indenture, in consideration of 50 *l.* paid him by T. Powis, he demised, granted, set, and to farm let, to the said T. Powis, the same tenements, to hold for the term of 99 years, reserving rent. The first lessee did not attorn; and the question was, whether the demise to Powis should amount to a bargain and sale, so that the reversion, with the rent, should pass to Powis, by the statute of uses, without any attornment. It was adjudged that this demise and grant, in consideration of 50 *l.*, amounted to a bargain and sale for 99 years; there being no necessity for the precise words bargain and sell. It was said, that as uses arise from the intention of the parties; if, by any clause in a deed, it appears that it was the intent of the parties to pass the land, in possession, by the common law, there no use shall be raised; therefore if any letter of attorney be in the deed, or covenant, to make livery of seisin of the lands, according to the form and effect of the deed, or other such like, it should not pass by way of use.

1 Inst. 49 *a.*

10. If a father makes a deed of feoffment to his son, and a letter of attorney to make livery, and no livery is made; no use will arise to the son: for then he should be in by the statute in another degree, namely, in the *post.* For the intention of the parties works much, both in the raising and directing of uses.

2 Roll. Ab. 787. pl. 5. Anon. 3 Leon. 16.

11. If a man, in consideration of natural love and affection, and of money, gives, grants, bargains,

sells, enfeoffs, and confirms to B. in fee, by deed indented, with a letter of attorney in the deed, to make livery, and the deed is after enrolled within six months; this shall pass as a bargain and sale, notwithstanding the letter of attorney in the deed. For the feoffor has given the feoffee an election to execute the estate one way or the other, and that way which first executes the estate shall stand.

Who may convey by.

12. As a bargain and sale only passes a use, none but those who are capable of being seised to a use can bargain and sell. For there must be a person seised to a use, and a use in *esse*, before the statute can have any operation. Tit. 11. c. 3.

13. It follows that neither the king, nor a queen regnant, can convey their lands in this manner. But, as all private persons may be seised to a use, they may convey their estates by bargain and sale.

14. Lord C. B. Comyns says, a corporation may bargain and sell, for they may give a use, though they cannot be seised to a use; and founds this position on the following case.

Holland v. Bonis, 3 Leon. 175.

15. The prioress of Hallywell conveyed certain lands, by the words *dedi et concessi pro certa pecuniæ summa*, to Lord Chancellor Audley and his heirs. It was objected, that a bargain and sale by a corporation was not good; for it could not be seised to another's use. But the Court rejected the objection as dangerous; for that such were the conveyances of the greater part of the possessions of monasteries. And it was said, that although such a corporation could not take an estate to another's use, yet they might charge their possessions with a use to another.

16. This case appears to be of doubtful authority; for the only principle upon which it can be supported, namely, that lands may be charged with a use, was

1 Rep. 127 *a.* utterly rejected in Chudleigh's case; in which it was held, that a use being a confidence and trust, it would be an absurdity to say that it was annexed to the land, like a rent or common; and it is now generally admitted that a corporation cannot stand seised to a use.

What may be conveyed by.

17. Every estate of freehold or inheritance in possession in land may be conveyed by bargain and sale. Therefore every person seised in fee simple, in tail, or for life, may convey his estate by bargain and sale.

18. It was formerly held, that there must be an actual seisin in the bargainor, at the time when the bargain and sale was made, for that without a seisin no use could arise. This seems too general, for in Fox's case it was held that a reversion expectant on a freehold estate, might be conveyed by bargain and sale. It appears to be now admitted, that estates in remainder and reversion may be conveyed by bargain and sale; provided the right to them be actually vested in the bargainor at the time.

Taylor v. Valc, Cro. Eliz. 166.

19. A rent in *esse* may be conveyed by bargain and sale, as also an advowson, tithes, commons, or any other incorporeal hereditaments; for they are expressly mentioned in the statute of uses. Such incorporeal hereditaments must, however, be in actual existence at the time, otherwise they will not arise from the bargain and sale.

Beaudeley v. Brooke, Cro. Ja. 189.

20. A person bargained and sold lands to J. S., in fee, together with a way over other lands. It was held that no right of way passed, because there was no grant of it in the indenture, but only a bargain and sale of the land, and of a way over the land; which could not be good, for nothing but a use passed by the deed, and there could not be a use of

a thing that was not in *esse* at the time, as a way, common, &c. that was newly created; for till such things were created, no use could be raised of them by bargain and sale.

21. No chattel interest in lands can be conveyed by bargain and sale, because the possessor of it has no seisin out of which a use can arise. It should however be observed, that where a person is seised of the freehold of lands, he may by bargain and sale create a chattel interest out of such lands; for having a seisin in himself, he is enabled to raise a use for years, as well as for any greater estate. And by the very words of the statute of uses, the possession is as fully tranferred to a *cestui que use* for years, as to a *cestui que use of* a freehold interest: nor will an entry be necessary, in such a case, to vest the legal estate.

Marshall v. Franks, infra, c. 19.

Fox's Case, ante.

Tit. 11. c. 3. § 4.

22. A bargain and sale is merely a conveyance of a use; now as a use cannot be raised without a consideration, it follows that no bargain and sale can be good without a consideration; which must also be a pecuniary one; for the very name of the conveyance imports a *quid pro quo*.

Requires a pecuniary Consideration.

1 Rep. 176 *a*. Moo. 569.

23. It is not however absolutely necessary that a consideration should be mentioned in the deed, for an averment of a consideration may be made. If a person, in consideration of a certain sum of money, bargains and sells, this is a good consideration to raise a use, without an averment of any sum in certain, for the quantity of the sum is not material; as any sum, however small, is a sufficient consideration.

2 Inst. 672.

infra, c. 19. Fisher v. Smith, Moo. 569. 2 Roll. Ab. 786.

1 Rep. 24 *a*. 10 — 34 *a*.

24. Where a person, in consideration of £100 paid by B., bargained and sold lands to B., C., and D., parties to the indenture, the lands passed to them all. For although the consideration was expressed to be

2 Inst. 672.

paid by one only, yet it must be intended that it was paid for them all.

25. Where no pecuniary consideration is given, the deed will be void as a bargain and sale, and no use will arise to the bargainee.

Ward v. Lambert, Cro. Eliz. 394.

26. A person by indenture, reciting that J. S. was bound in a recognizance and bond for him, for divers good causes and considerations, bargained and sold lands to him and his heirs. It was proved that no money was paid; and the conveyance was held void, as a bargain and sale.

Osborn v. Bradshaw, Cro. Ja. 127.

Crossing v. Scudamore, 1 Vent. 137.

27. A person, in consideration of natural love, and for augmentation of the portion, and preferment in marriage of his daughter, bargained and sold lands to her. It was resolved, that as no pecuniary consideration was given, the deed could not operate as a bargain and sale.

28. No use will arise upon a conveyance to a person, upon trust to pay the debts of the grantor; where the debts are to be paid out of the lands conveyed.

Lord Paget's Case, 1 Leon. 194.

29. By indenture between Lord Paget and one Trentham, Lord P., in consideration that, with the profits of the lands to be conveyed, Trentham would pay his debts, covenanted to stand seised to the use of Trentham for 24 years. It was resolved, that no use arose, for want of a consideration, for the debts were to be paid out of the profits of the lands, so that no consideration moved from Trentham. But it was agreed, that if Trentham was to have paid the debts out of his own lands, that would have been a sufficient consideration, and the deed would have operated as a bargain and sale.

A Rent may be reserved. 1 Inst. 144 *a*.

30. At common law, no rent could be reserved on a bargain and sale; because nothing but a use passed,

which was not such an estate as the bargainor could have recourse to for a distress. After the statute of uses, it was resolved, that a rent might be reserved on a bargain and sale, and that the reservation of such rent would be considered as a sufficient consideration to raise a use to the bargainee. Wykes v. Tillerd, Cro. Eliz. 595.

31. When the statute of uses was made, it was foreseen, that all lands would thenceforth be conveyed by bargain and sale, being a conveyance of a private nature. To prevent this, the legislature in the same sessions passed an act, 27 Hen. VIII. c. 16., by which it is declared, that no manors, lands, tenements, or other hereditaments, shall pass from one to another, whereby any estate of inheritance or freehold shall be made, by reason of any bargain and sale, except the same bargain and sale be made by writing indented, sealed, and enrolled in one of the King's courts of record at Westminster; or within the county where the lands lie, before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the same county, or two of them at the least, whereof the clerk of the peace to be one. Must be enrolled. 2 Inst. 671.

32. This statute requires all bargains and sales of land to be in writing. Therefore Lord Coke says, they must not be by print or stamp. It is also required, that they be by indenture. Although the indenture may be either on parchment or paper, yet the enrolment must be on parchment; it being so required in the clause of enrolment by the clerk of the peace; the same is implied where the enrolment is in any of the king's courts of record. 2 Inst. 672. Id. 673.

33. The time prescribed by the statute for enrolment is six lunar months, to be computed from the day of the date of the deed, which is exclusive. If Id. 674. 5 Rep. 1 Hob. 140 Thomas v. Popham, Dyer, 218.

the deed has no date, then the time must be computed from the delivery.

34. By the statute 5 Eliz. c. 26. bargains and sales of lands lying in the counties palatine of Lancaster, Chester, and the bishopric of Durham, are required to be enrolled in the respective courts of those counties.

35. By the statutes 5 Ann. c. 18., 6 Ann. c. 35., and 8 Geo. II. c. 6., bargains and sales of lands lying within the west, east, and north ridings of the county of York, may be enrolled before the registers of those ridings, and shall be as good as if enrolled at Westminster.

36. By the statute 10 Ann. c. 18. § 3. it is enacted, that a copy of the enrolment of a bargain and sale, examined with the enrolment, signed by the proper officer, and proved upon oath to be a true copy, so examined and signed, shall in all cases be of the same force and effect as the indenture of bargain and sale would be, if the same was produced.

Exceptions. Lands in Cities, &c.

37. There is a proviso in the statute of enrolments, that it shall not extend to lands, &c. lying within any city, borough, or town corporate, wherein the mayor, recorder, &c. have authority to enrol; in consequence of which, lands and tenements in cities and boroughs having the privilege of enrolment, are not within the act; and though the intention of the statute was only to exempt them from enrolment in the courts at Westminster, yet it is worded in such a manner, that they are discharged from any enrolment whatever.

2 Inst. 675.

And Terms for Years.

38. The words of this statute only extend to estates of inheritance or freehold; therefore a bargain and sale of lands, for a term of years, need not be enrolled.

Relation of Enrolment. 2 Inst. 674.

39. In consequence of this statute, the freehold does not pass from the bargainor until the deed of

bargain and sale is duly enrolled; but if it be enrolled within the time prescribed, then the enrolment has such a relation back to the date, or time of delivery of the bargain and sale, that the freehold is considered, in law, as having passed, to all intents and purposes, from the bargainor to the bargainee, immediately on the date or delivery of the bargain and sale.

40. All conveyances or incumbrances made or created by the bargainor, subsequent to the date or delivery of the bargain and sale, and prior to the enrolment, are therefore void as against the bargainee.

41. A person conveyed lands by bargain and sale to one, and afterwards conveyed to them another by bargain and sale. The last deed was enrolled: afterwards the first deed was enrolled, within the six months. It was resolved, that the first bargainee should have the land, as it had relation to make it the deed of the vendor, and to pass the land from the delivery of the deed. Bro. Ab. Faits Inrol. pl. 9.

42. One Sewster being seised of certain lands in fee, by deed, dated 7 November, bargained and sold them for money. On the 9th of the same month he acknowledged a recognizance: on the 20th, the deed was enrolled. On a *scire facias*, brought upon the recognizance, the question was, whether Sewster was to be considered as having been seised of the lands on the 9th of November, the deed not having been enrolled till the 20th of that month. It was adjudged unanimously, that Sewster was not seised of the lands on the 9th November, for that when the deed was enrolled, the bargainee was in judgement of law seised of the lands from the date of the deed. Mallory v. Jennings, 2 Inst. 674.

43. Neither the death of the bargainor, nor that of the bargainee, before enrolment, will prevent the 2 Inst. 674. Dymock's Case, Cro. Ja. 408. Hob. 136.

passing of the estate. And where the bargainee dies before enrolment, if the deed be duly enrolled, his heir will be in by descent.

2 Inst. 671. Flower v. Baldwin, Cro. Car. 217.

44. Though the enrolment has relation back, for the advantage of the bargainee, to avoid all mesne incumbrances and conveyances; yet when the lands are also conveyed by fine or feoffment to the bargainee, before enrolment, he shall take by the fine or feoffment. For when a conveyance by the common law, and one by the statute of uses, concur, that by the common law shall be preferred; if, in a case of this kind, the bargainor incumbers the estate between the execution of the bargain and sale, and the fine, &c., then the inrollment shall have relation back; for the avoiding such mesne incumbrance, in favour of the bargainee.

45. It is said by Lord Hardwicke, that if there is a first bargainee, whose deed is not enrolled, and a second bargainee whose deed is enrolled; if the second bargainee had notice of the prior deed, such prior deed shall prevail in equity, for a reason which will be stated hereafter. And if the first bargainee has any other conveyance, as a feoffment, or a lease and release, he shall prevail at law.

Vide c. 27.

46. A bargain and sale does not devest any estate, nor can a use be declared on it; as will be shown in the next chapter.

TITLE XXXII.

DEED.

CHAP. X.

Of a Covenant to stand seised.

1. *Nature of.*
9. *Who may covenant to stand seised.*
10. *What may be conveyed by.*
13. *What Consideration necessary.*
27. *A Use only arises to the Persons within the Consideration.*
31. *The Estate continues till a Use arises.*
32. *A Rent may be created by.*
34. *No Estate is devested by this Conveyance, or by a Bargain and Sale.*
37. *No Uses can be declared on these Conveyances.*

Section 1.

THE second kind of conveyance which derives its effect from the statute of uses, and operates without transmutation of possession, is called a covenant to stand seised. Nature of.

2. Formerly, if a person had covenanted and agreed for himself and his heirs, that for a certain consideration, another should have his lands; though the lands did not pass, for want of livery, yet the use passed to the covenantee. Now whenever a covenant of this kind is entered into, if the consideration be sufficient, a use arises out of the seisin of the covenantor, which is immediately executed by the statute in the *cestui que use*, who thereby acquires the legal estate. Plowd. 301. 3.

3. The proper and technical words of this conveyance are, covenant to stand seised to the use of A., &c. But any other words will have the same 2 Vent. 150. Willes R. 676.

effect, if it appear to have been the intention of the parties to use them for that purpose. Thus in the case of Crossing v. Scudamore, the words bargain and sell were held sufficient to create a covenant to stand seised.

ante, c. 9. § 27.
1 Vent. 137.
1 Mod. 175.

Harrison v. Austin, 3 Mod. 237.

4. A settlement was made in the following words. "If I have no issue, and in case I die without issue of my body lawfully begotten, then I give, grant, and confirm my land to my kinswoman S. Stokes, to have and to hold the same to the use of myself for life, and after my decease, to the use of the said Sarah and the heirs of her body to be begotten; with remainders over." It was held that this was a good covenant to stand seised.

Doe v. Simpson, 2 Wils. R. 22. Willes R. 673.

5. G. S., in consideration of his marriage with Ann Story, gave, granted, enfeoffed, aliened, and confirmed certain lands to Ann and W. Story for life, remainder to the heirs of the body of Ann Story begotten by G. S., who covenanted that the lands should remain to the same uses. The marriage took effect; and G. S. became a bankrupt. The assignees sold the land, considering the deed as void in law; or if not, that G. S. was tenant in tail. The Court resolved that the deed operated as a covenant to stand seised.

Roe v. Tranmer, Tit. 16. c. 5. § 24.
Doe v. Salkeld, Willes R. 673.

6. On the other side, where it does not appear to have been the intention of the owner of the estate to raise a use, though the word covenant be used, yet the deed will not operate as a covenant to stand seised.

Blithman's Case, Dyer, 55 *a*.

7. A father, tenant in tail, covenanted with his son, in consideration of marriage, that after his death the lands should descend, remain, and be with the son, and the heirs of his body. The Court held that no use was raised; this being an executory covenant: for

the manner of raising a use in such a case was, to covenant to stand seised to such a use; or that the land should be to such a use, or that such a one should be seised to the use: here the words were words of covenant.

8. A person covenanted, in consideration of natural affection, to stand seised to the use of himself for life, and after his death that the said lands should descend or remain to his cousin B. in fee. Resolved by all the Judges, that no use was raised, by reason of the said disjunctive, remain or descend; and that it was only a covenant. Englefield's Case, Jenk. 267. Dyer, 55 *a.* Samou v. Jones, 2 Vent. 318.

9. This conveyance being similar in many respects to a bargain and sale, no person can transfer lands by it, who is not capable of being seised to a use. Who may covenant to stand seised. ante, c. 9. § 12.

10. It follows from the same principle that no species of property can be transferred by covenant to stand seised, which cannot be conveyed to a use: the covenantor must be seised in possession, or entitled in remainder or reversion, at the time of the execution of the deed; because the use must arise out of the seisin, or right, which the covenantor has at the time. What may be conveyed by. Tit. 11. c. 3.

11. A father covenanted, in consideration of natural affection, to stand seised of all the lands which he had, or should afterwards purchase, to the use of himself for life, remainder to his youngest son and his heirs. It was determined, that the after purchased lands did not vest in the youngest son by this deed; because a man cannot, by a covenant, raise a use out of land which he has not. Yelverton v. Yelverton, Cro. Eliz. 401.

12. If two persons are joint tenants in fee, and one of them covenants that, after the death of his companion, he will stand seised of all the moiety of his companion to certain uses: though the covenantor Barton's Case, 2 Roll. Ab. 790.

The Estate continues till a Use arises. 1 Rep. 154 *a.*

31. In the case of a covenant to stand seised, the estate continues in the covenantor till a lawful use arises. Thus, if a person makes a feoffment in fee, to the use of A. for life, remainder to the use of B. for life, remainder to the use of C. in fee; if A. refuses, B. shall take the estate presently. For the feoffor by his feoffment has given all his estate out of him, and all the uses are created out of it, as out of one and the same root; therefore, as long as any of the uses can take effect, the feoffor shall not have the land. In the case of a covenant which raises a use, there the consideration, which is the cause that raises every several use, is several, and all the uses grow and rise out of the estate of the covenantor: therefore, if one refuses, he who is next in remainder shall not take the land presently, but the covenantor shall keep it.

A Rent may be created by. Tit. 28. c. 1. § 31.

32. In consequence of the 4th and 5th sections of the statute of uses, a rent may be created by a covenant to stand seised.

Rivetts v. Godson, W. Jones, 179.

33. A., in consideration of natural love and affection, covenanted to stand seised to the use of himself for life, remainder to B. his son in tail: and to the intent that B. should have a rent issuing out of the lands, during the life of A. Resolved, that B. was well entitled to this rent upon the words of the statute of uses.

No Estate is devested by this Conveyance, or by a Bargain and Sale. Tit. 11. c. 3. § 19.

34. A bargain and sale, and covenant to stand seised, pass no interest but that which the bargainor or covenantor can lawfully transfer. For as nothing but a use passes by these conveyances; and as no use can be greater than the estate out of which it is created; where a use is granted, greater than the legal estate out of which it is to issue, it is merely void;

would pass: for the express valuable consideration tolled the tacit implied consideration of blood: and no other consideration could be averred, than was contained in the deed. Contra, 22. Vin. Ab. 196.

27. In the case of a covenant to stand seised, a use will arise to the persons who are within the consideration; though no use will arise to those who are strangers to it. A Use only arises to the Persons within the Consideration.

28. Tenant in tail, remainder in fee. The person in remainder, to the intent that his lands should continue and remain in his family name and blood, covenanted to stand seised to the use of himself and the heirs male of his body, remainder to the use of his brother in tail, remainder to the use of the Queen, her heirs and successors. Resolved, that a use arose to the covenantor in tail, and to his brother; but that no use arose to the Queen, for want of a consideration. Wiseman's Case, 2 Rep. 15 *a*.

29. P. Risley, by indenture between him and Sir T. D., Sir A. D. T. Risley his brother, and W. W., covenanted and agreed with them, to stand seised of certain lands, to the use of himself for life, remainder to the use of his wife for life, remainder to the use of the covenantees and their heirs, upon several trusts, for his children. Resolved, that the uses were well raised and vested in T. Risley his brother, he being of the blood of the covenantor; but that no use arose to the other covenantees, they being strangers. Smith v. Risley, Cro. Car. 529.

30. A. covenanted to stand seised to several uses, afterwards to C. for 99 years, if he should so long live, remainder to a stranger for the life of C. to preserve contingent remainders, remainder over. Agreed by all, that the remainder to the stranger was void. Whaley v. Tancred, 2 Lev. 52. 54.

TITLE XXXII.

DEED.

CHAP. XI.

Of a Lease and Release.

1. *Origin and Nature of.*
9. *Who may convey by.*
10. *What may be conveyed by.*
11. *Estates in Remainder and Reversion.*
14. *Incorporeal Hereditaments.*
15. *What Consideration necessary.*
18. *Does not devest any Estate.*
20. *Whether a Use results on it.*
23. *To whom the Title Deeds belong.*

SECTION 1.

Origin and Nature of.

THERE is a third sort of conveyance usually classed under those which derive their effect from the statute of uses; but of which only one part is derived from that statute, and the other from the principles of the common law. It is called a lease and release, but is in fact a bargain and sale for a year, and a common law release, operating by way of enlargement; and owes its rise to the following circumstances.

2. The framers of the statute of uses foresaw that freehold estates would thenceforth become transferrable by parol only, without any form or ceremony whatever. The statute of enrolments was therefore made in the same parliament, which would have introduced an almost universal register of conveyances of real estates, but for the omission of bargains and sales for terms of years.

2 Mod. 252.

3. In the times of Hen. VI. and Edw. IV., it was not unusual to transfer freehold estates in the following

manner. A deed of lease was made to the intended purchaser, for three or four years, and after he had entered into possession, a deed of release of the inheritance was executed to him, which operated to enlarge his estate into a fee simple.

4. When it was observed that the statute of uses transferred the actual possession, without entry, the idea of a lease and release was adopted. A bargain and sale for a year was made by the vendor, to the person to whom the lands were to be conveyed; by this a use was raised in the bargainee, without any enrolment, to which the statute transferred the possession. Thus the bargainee became immediately capable of accepting a release of the freehold and reversion; and accordingly a release was made to him, dated the day next after the day of the date of the bargain and sale. All this was considered as equal to a feoffment.

1 Inst. 271 *b.* n. 1. Heyward's Case, infra, c. 19.

5. Fabian Philips says, this conveyance was at first only purposely contrived by Serjeant Moore, at the request of Lord Norris, to the end that some of his kindred or near relations should not take notice, by any search of public records, what conveyance or settlement he should make of his estate.

Treat. on Capias.

6. The validity of this conveyance was formerly much doubted. Mr. Noy was of opinion that it could not be supported without an actual entry by the bargainee. But it was resolved in 18 Ja. I., by the Chief Justices Montague and Howard, and Chief Baron Tanfield, that upon a deed of bargain and sale for years of land, though the bargainee never entered, if afterwards the bargainor makes a grant of the reversion, reciting the lease, to divers uses, it was a good conveyance of the reversion. And in a sub-

2 Mod. 252.

Lutwich v. Mitton, Cro. Ja. 604. Cro. Car. 110.

Barker v. Keate, 2 Mod. 249.

sequent case, where there was a bargain and sale for years, followed by a release, judgement was given —"That the lease being within the statute of uses, there was no need of an actual entry, to make the lessee capable of the release; for by virtue of the statute he shall be adjudged to be in actual possession."

1 Freem. 251.

7. It is said by Lord Ch. J. North, that he had known it ruled several times, that a lease and release in the same deed was a good conveyance; for priority should be supposed. And the words demise, grant, and to farm let, for six months, reserving a peppercorn rent, have been held to amount to a good bargain and sale to ground a release.

Barker v. Keate, 2 Mod. 252.

2 Lev. 108. 6 Mod. 44.

8. The recital of a lease for a year, in a deed of release, is good evidence of such lease against the releasor, and all claiming under him; but not against strangers; without proving that there was such a deed, and that it was lost or destroyed.

Who may convey by.

9. Every person capable of being seised to the use of another may convey by lease and release; but neither the king, nor a queen regnant, can convey in this manner, nor can a corporation, for the reason already mentioned.

ante, c. 9. § 16.

What may be conveyed by.

10. Every species of property that is capable of being conveyed to uses, may be the subject of a lease and release.

Estates in Remainder and Reversion.

11. Not only estates in possession, but estates in remainder and reversion, may be conveyed by lease and release: this point is fully proved by Mr. Booth in an opinion which has been printed. He admits Lord Coke's position that a release cannot work without a possession; but contends he only means that the estate, upon which the release is to work, must be a vested estate; for in the same folio Lord

Cases and Opinions, vol. 2. 144. 1 Inst. 270 *a*.

Coke says—"If a man make a lease for years, remainder for years, and the first lessee enters, a release to him in the remainder for years is good, to enlarge his estate:" which showed his opinion to be, that it is not necessary the estate to be enlarged should be in actual possession, and that it sufficed if it was a vested estate, divided from the possession.

12. In the case of Shortridge v. Lamplugh, which will be stated in a subsequent part of this chapter, the person who conveyed by lease and release, had only a reversion expectant on a term for years: and this circumstance does not appear to have been noticed either by the counsel, or the judges. § 17.

13. Estates in remainder and reversion expectant on estates for lives, may be conveyed by lease and release: but in cases of this kind it is inaccurate to say that the releasee is in the actual possession of the premises; the proper expression being, that they are actually vested in him by virtue of the bargain and sale, and the operation of the statute of uses. ante, c. 9. § 18. 1 Inst. 270 a. n. 3.

14. Incorporeal hereditaments, such as advowsons, tithes, rents, &c., may be conveyed by lease and release, because they are expressly named in the statute of uses, or comprised under the general word *hereditaments*. Incorporeal Hereditaments.

15. Although no use can be raised on a bargain and sale without a pecuniary consideration; yet when the conveyance by lease and release became a common assurance, only a nominal consideration of five shillings was mentioned in the bargain and sale; and even a reservation of a pepper-corn rent has been held a sufficient consideration to raise a use in a bargain and sale to ground a release. What Consideration necessary. Barker v. Keate, 2 Mod. 252.

16. There is no necessity for expressing any consideration in a deed of release to a bargainee for

years; because it operates as a common law conveyance.

Shortridge v. Lamplugh, 2 Ld. Raym. 798.

17. In a writ of error from the Common Pleas, the case was, that T. Ashby demised the lands in question for 61 years, reserving rent; afterwards he bargained and sold them for five shillings to Sir W. M. for one year; and by another indenture, dated the day after, he released and confirmed them to Sir W. M. in fee; it was resolved that the estate was well vested in the releasee, though no consideration was mentioned in the release.

Does not devest any Estate. § 690.

18. A conveyance by lease and release does not devest any estate, or create a discontinuance or forfeiture; for Littleton says,—"By force of a release nothing shall pass but the right which he may lawfully and rightfully release, without hurt or damage to other persons, who shall have right therein, after his decease." And in a subsequent section he says,—"If tenant in tail lets the land to another for term of years, by force whereof the lessee hath possession, and the tenant in tail releases all his right in the same land, to hold to the lessee and his heirs for ever, this is no discontinuance: but after the decease of the tenant in tail, his issue may enter; for by such release nothing passed but for term of the life of the tenant in tail."

696.

Fearne, Cont. Rem. 473. Willes Rep. 383.

19. This conveyance will not, for the same reason, destroy a contingent remainder: therefore if a person is tenant for life, with a contingent remainder depending on his estate, and he conveys in fee by lease and release, the contingent remainder will not be destroyed.

Whether the Use results on it. Tit. 11. c. 4.

20. A release may be to uses, as will be shown in the next chapter; but it has been doubted whether there can be a resulting use upon a lease and release.

TITLE XXXII.

DEED.

CHAPTER XII.

Of Declarations of Uses.

1. *Origin and Nature of.*
2. *Must be by Deed or Writing.*
5. *No technical Words necessary.*
8. *How the Lands should be described.*
9. *No Consideration necessary.*
11. *Deeds to lead Uses.*
18. *Deeds to declare Uses.*
27. *Who may declare Uses.*
28. *Infants.*
32. *Married Women.*
37. *Idiots and Lunatics.*
38. *The Right to declare Uses is co-extensive with the Estate.*
42. *Uses may be declared on a Lease and Release.*
44 *The Releasee cannot dissent.*

Section 1.

Origin and Nature of.

WITH respect to those conveyances derived from the statute of uses, which are said to operate by transmutation of possession, they owe their effect to the following principles. Where lands are conveyed by feoffment, fine, or recovery, the legal seisin and estate becomes vested by these conveyances in the feoffee, cognizee, or recoveror; but if the owner of the estate declares his intention that such feoffment, fine, or recovery shall enure to the use of a third person, a use will immediately arise to such third person, out of the seisin of the feoffee, cognizee, or recoveror, and the statute will transfer the actual possession to such use, without any entry or claim. Tit. 11. c. 4.

Must be by Deed or Writing.

2. Uses might formerly have been declared by parol. But it is enacted by the statute of frauds,

have only a seisin of an instant, and are never called upon to defend the land; and it seems reasonable to suppose, that where a statute transfers the legal seisin of the lands from one person to another, it should also transfer the deeds relating to the title of such lands; as they must be totally useless in the hands of a person who has no interest in the estate.

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Must be by Deed or Writing.

2. Uses might formerly have been declared by parol. But it is enacted by the statute of frauds,

29 Cha. II. c. 5. § 7. "That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect."

3. It has been long settled, that the word trust, in this statute, comprehends uses; and Lord Holt says,

Holt's Rep. 736. 11 Mod. 197.

"We take trusts and uses to be the same, in respect of trusts in their larger extent, and so within the statute."

4. It was not absolutely necessary, under the words of this act, that a declaration of uses should be by

7 Mod. 76.

deed; for Lord Holt has said, that since the statute of frauds, uses might be declared by writing only,

infra, § 23.

without seal. But there has been another act on this subject, which will be stated hereafter.

No Technical Words necessary.

5. No technical words are required in a declaration of uses: and Lord Holt has said, that it is not even necessary to insert the word use in the declaration of

1 Ld. Raym. 290. 3 P. Wms. 209.

uses of a fine, or recovery; for that any kind of agreement which manifestly shows the intent of the parties will be sufficient.

Dyer, 166. a.

6. This doctrine is conformable to the law as it

Hussey's Case, 1 Roll. Ab. 614. Mitton v. Lutwich, W. Jones, 7.

stood before the statute of frauds. It having been determined in 2 James, that a will, though revoked, should operate as a declaration of the uses of a feoffment.

7. In conformity to this doctrine, it is laid down

1 Ld. Raym. 291. 12 Mod. 163.

by Lord Holt, *arguendo*, that if A. bargains and sells to B. and his heirs, and the deed is not enrolled, or if a deed of feoffment is not executed by livery, and a fine is levied between the same parties, the deed of bargain and sale, or feoffment, will declare the uses of the fine.

8. In a declaration of the uses of a fine or recovery, the lands ought to be described with as much minuteness and accuracy as in a feoffment or release. For as lands are described in a fine or recovery in the same manner as in a *præcipe quod reddat*; that is, only by the number of messuages, cottages, acres of arable, meadow, and pasture, &c.; it is proper to have a more particular description in the declaration of uses; which is the measure that usually guides juries in ascertaining the estates comprised in a fine or recovery. And there are many instances, where the Court of Common Pleas has directed the description of lands, in fines and recoveries, to be amended, in conformity to the deed of uses. Hence arises an obvious propriety in connecting the description in the fine and recovery with that in the deed. There is also an advantage in stating in the deed the description contained in the fine or recovery.

How the Lands should be described.

Vide Tit. 35 & 36.

9. No consideration is necessary to raise a use on a fine or recovery, although in the case of a bargain and sale, and covenant to stand seised, it has been shown, that a consideration is absolutely necessary. The reason of this difference is thus explained by Mr. Hargrave. In the case of a declaration of uses, the estate is passed completely from the grantor, without the aid of a court of equity; therefore it is immaterial whether the use declared on the estate is gratuitous or not; it being sufficient that the grantees receive it coupled with a trust or use. But in the case of a bargain and sale, or covenant to stand seised, the transaction rests in covenant or agreement between the covenantor or bargainor, and the *cestui que use*; and if the covenant or agreement was not founded on the consideration of blood, or a valuable consideration, such as marriage or money, our courts

No Consideration necessary.

1 Inst. 123 *b.* n. 8.

of equity, which, till the stat. 27 Hen. VIII. had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, Chancery would enforce uses annexed to a perfect gift, however gratuitous they might be; but not those resting on a naked contract; without even so much as the consideration of blood to maintain them.

c. 10. § 20. 10. It has been stated, that no use will arise, on a covenant to stand seised, to an illegitimate child. Uses, 207. Gilbert says, if a man covenants by indenture, in consideration of love and affection, blood and marriage, of his bastard daughter; though this be not a sufficient consideration to raise a use upon a covenant; yet it is expressive of the intent of the party, and therefore shall serve as a sufficient declaration of a use upon a fine, where there needs no consideration.

Deeds to lead Uses. 11. Where deeds are executed prior to the levying fines, or suffering recoveries, (for feoffments to uses are now disused,) they are called deeds to lead the uses; and where they are executed subsequent to a fine or recovery, they are then called deeds to declare the uses of them.

Countess of Rutland's Case, 5 Rep. 25. 12. With respect to deeds to lead uses, it was resolved in 1 Jac. I.—1°. That although they were but directory, and did not bind the estate or interest of the land, yet if the fine or recovery was pursued, according to the indentures, there could not be any bare averment against the indentures, that after the making of them, and before the assurance, it was agreed that the assurance should be to other uses. But if another agreement was made by writing, or by other matter, previous to the fine or recovery, as high or higher; then the last agreement should stand.

2°. If the form of the indentures was not pursued, as to the quantity of land, or the time within which,

&c.; in these cases, an averment without writing might be made, that the fine or recovery was to another use or intent than was contained in the indenture. For inasmuch as the indentures were not pursued, it was reasonable that the parties should be admitted to show the cause why they were not pursued, by reason of the new agreement subsequent; which in such case might be as well by word as by writing.

3°. That although the indentures were not pursued, in circumstance of time, quantity, person, and the like; yet if no other new mean agreement could be proved, the assurance should be, in judgement of law, to the use contained in the indenture.

13. The statute of frauds has made no alteration in the law respecting the efficacy of deeds to lead the uses of fines and recoveries, except that of excluding all averments respecting the intention of the parties. Therefore, where the uses are declared before the fine or recovery, they cannot be controlled by any declaration, or even by deed, after. But where the fine or recovery is not levied or suffered according to the deed; such deed may be controlled by a subsequent deed or writing.

Tregame v. Fletcher, 2 Salk. 676.

14. Ann Bowyer, by indentures of lease and release, in consideration of a marriage then intended between her and E. Morley, and an agreement on his part to settle a jointure of 300 *l.* a year on her, conveyed her estate to trustees, in trust for herself and her heirs until the marriage took effect, and the jointure was made; and afterwards to the use of E. Morley and his heirs. The marriage took place; and soon after a second deed was executed, dated 29th January 1665, between Morley and his wife, and the trustees, reciting that a fine was already acknowledged, and agreed to be levied in due form of law, in the next

Jones v. Morley, 1 Ld. Raym. 287. 2 Mod. 159.

Hilary term, between the trustees and Morley and his wife; it was declared, that the same should enure to the use of Morley and his heirs. Two days after the execution of this deed (31st January), and before the fine was levied, a writing indented was executed between Morley and his wife; whereby they, in consideration of the marriage, and other good causes, did covenant, consent, and agree, to revoke all former grants, bargains, contracts, writings, covenants, and obligations made between them, until Morley had performed the agreements in the marriage settlement on his part: and that in default thereof, it might be lawful for the wife and her heirs to enter upon the lands conveyed by the settlement, without the let of the husband or his heirs. The fine was levied on the 9th February in that term. Morley did not settle a jointure pursuant to the agreement, and the wife died without issue. The question was, whether the fine should enure to the use of Morley and his heirs, according to the deed of the 29th January, or to the use of his wife and her heirs, according to the writing of the 31st January.

The Court held, that the fine did not enure to the use declared by the deed of the 29th January, but that it was controlled by the writing of the 31st January. To prove which, Lord Holt premised three propositions. 1. If it be covenanted by deed to levy a fine to such persons and uses, and the fine is levied pursuant to the deed; no proof whatever, by parol, shall be admitted to prove that this fine was levied to other uses: but a subsequent deed may alter the uses of the fine; though a parol agreement (as this writing between a husband and wife is not a deed, but amounts to a parol declaration,) cannot. If there be a variance between the deed and the fine,

in any circumstance, then the parties may aver the fine to be levied to other uses. 2. Though there be a variance between the deed and the fine, yet, if nothing appear to the contrary, the fine shall be taken to be to the uses of the deed; and in that case, the deed is not only evidence of the uses, but the fine is, by construction of law, to the uses of the deed. 3. If the fine had agreed with the deed, the uses limited by the deed could not have been controlled by the writing of the 31st January: because, though the deed of a feme covert is not valid in law; yet the deed having relation to the fine, takes validity from thence, and will conclude her. From these premises, Lord Holt concluded, that the fine could not be to the use of the deed of the 29th January, because the fine to be levied by that deed, ought to have been levied in the following Hilary term, exclusive of that Hilary term in which the deed was made; but the fine was levied in that Hilary term; and therefore, there was a variance between the fine and the deed; and consequently room was left for averment. For if the deed had been pursued, the wife would have had twelve months to see whether the husband would perform the marriage agreement; and if he would not, she might have refused to join in levying the fine; of which benefit she was deprived, by its having been immediately levied. Then the husband, by the writing of the 31st January, agreed to the terms stipulated in the marriage settlement, and the fine was levied accordingly; from whence it manifestly appeared, that the agreement contained in the deed of 29th January was relinquished; and the new agreement of the 31st, was designed to lead the uses of the fine. It was therefore agreed by the Court, that the writing of the 31st January was a sufficient

declaration of the uses of the fine: and if it were not, yet it would be sufficient to control the deed of the 29th; for it was there agreed, that all conveyances, &c. made in contradiction to the marriage settlement, should be null and void. Then, if no use could arise under the deed of the 29th, the use resulted to the wife and her heirs, and judgment must be given accordingly.

Show. 140. Upon a writ of error to the House of Lords, the judgment was affirmed.

Fleetwood v. Templeman, 2 Atk. 79. 15. A man and his wife made a mortgage in 1692 of the wife's estate, and covenanted in the mortgage deed, to levy a fine in the Easter term following. The fine was not levied till Trinity term 1695. Afterwards, but in that term, in consideration of more money, they joined in a conveyance of the equity of redemption; and covenanted that the fine which had been levied should be to the uses of this last deed.

Lord Hardwicke was inclined to think, as the covenant to levy the fine under the first deed was confined to a particular term, and the fine was not levied till after that, the husband and wife might, by the deed in 1695, covenant that the fine which had been levied should be to the uses of the latter deed; and that the former deed might be laid out of the case, as the covenant for levying the fine in Easter term was not strictly pursued.

16. A second deed to lead the uses of a fine or recovery must be executed by all those who were parties to the first deed, and were concerned in interest, in order to render the first deed void.

Stapilton v. Stapilton, 1 Atk. 2. 17. Philip Stapilton being tenant for ninety-nine years, if he should so long live, with remainder to trustees to preserve contingent remainders, remainder

to his first and other sons, and having two sons, Henry and Philip; the father and sons, by deeds of lease and release, dated the 9th and 10th September 1724, conveyed the premises to two persons as tenants to the *præcipe*, for the purpose of suffering a common recovery, which was to enure, as to part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to his first and other sons in tail, remainder to Philip the son for life, remainder to his first and other sons in tail, &c. There were covenants to suffer a recovery within twelve months, and likewise for further assurances. Before any recovery was suffered, Henry the son died, leaving issue Henry the plaintiff. Afterwards, by lease and release, 12th and 13th April 1725, to which the heir of the surviving trustee in the original settlement of 1661 was a party, Philip the father and Philip the son covenanted to suffer a recovery of the same premises, to the use (as to part) of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father for life, remainder to Philip the son in fee.

In Trinity term 1725, a recovery was suffered, in which were the same tenant to the *præcipe*, the same demandant and vouchees (except Henry, who was dead), as were covenanted to be by the first deed. It was likewise suffered within twelve months after the execution of the first deed. It was proved in the cause, that Henry the son, who died before the recovery was suffered, was a bastard; and the question was, whether the son of Henry was entitled to the premises under the declaration of uses made in the year 1724? or whether that declaration was avoided by the subsequent declaration in 1725?

Lord Hardwicke.—The first question in this case is,

whether the lease and release of the 9th and 10th of September 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April 1725? I am strongly inclined to think that the lease and release of 1724, will amount to a good declaration of the uses of the recovery. This question depends on the construction of law, and the authority of cases upon the declaration of uses. It is true, where there is an agreement to suffer a recovery, and uses are declared, if the recovery is afterwards suffered, though it varies in point of time from the recovery covenanted to be suffered; yet if there be no subsequent declaration of uses, the recovery will enure to the uses so declared; and before the statute of frauds, if the deed declaring the uses had not been pursued, a parol declaration of the uses would have been admitted; but if there was a deed declaring the uses, and the recovery was suffered accordingly, that would, before the statute, have excluded a parol declaration of new uses. But even now there may be a subsequent declaration of other uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties: therefore, though it was said at the bar, that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law; for such subsequent declaration of uses must be by all the parties concerned in interest. And in the case of the Countess of Rutland, it is not laid down that the tenant in tail may declare new uses, but it is said, *whilst it is directory only, new uses may be declared;* and the meaning of that is, that as the new uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done by the mutual consent of

5 Rep. 25.

all the parties concerned in interest; and in that case it was a mutual agreement of all the parties. But in the present case, the second agreement not being between all the parties concerned in interest, ought not to controul the first declaration, and especially as the recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant.

Deeds to declare Uses.

18. With respect to deeds executed subsequent to a fine or recovery, it was formerly doubted whether they could operate so as to direct the uses of such prior fine or recovery; because where a fine was levied, or a recovery suffered, without any consideration, the use immediately resulted; and when the use was once vested, it was doubted whether it could afterwards be divested, by any subsequent declaration. But it was resolved in 3 & 4 Phil. & Mary, that a deed executed four years after a recovery, was sufficient to declare the uses of it. And in a subsequent case, 28 Eliz., it was resolved by the Court of C. P., that an indenture subsequent was sufficient to direct and declare the uses of a precedent recovery.

Tit. 11. c. 4.

Basset's Case, Dyer, 136.

Downman's Case, 9 Rep. 7 *b.*

19. A deed of this kind must however refer to the recovery; for if there be a variance between the deed and the recovery, the deed will not operate as a declaration of the uses of such recovery.

Whetstone v. Wentworth, 2 Roll. Ab. 799.

20. Thus where a person suffered a recovery, Oct. Mich. 3 Edw. VI., and an indenture was made on the 14th November following, in which it was expressed that all recoveries thereafter to be suffered between the parties, should be to the uses contained in that indenture: it was held that the recovery suffered before, should not be to the use of that indenture, though all Michaelmas term was but one day in law;

Staplehill v. Bully, Prec. in Cha. 224.

for the word thereafter, excluded all recoveries before suffered, without an averment of the intent.

21. A deed to declare the uses of a recovery may be controlled by a subsequent one.

Vavisor's Case, Dyer, 307.

22. A feme sole, before the statute of uses, suffered a recovery, and intending to marry A. B., she, before the marriage, executed an indenture declaring the use of the recovery to herself and A. B. and their heirs. The recoverors having notice of the indenture and marriage, executed an estate to the husband and wife, and their heirs. Afterwards the husband and wife, by other indentures, declared that the first indentures were mistaken, for that the use should have been to the heirs of their two bodies, remainder to the heirs of the wife; and they covenanted and agreed to stand seised to the use of themselves in tail, and after to the right heirs of the wife.

It was held that the first indenture was corrected by the second; and the first use sufficiently altered, without estate executed.

23. By the statute 4 Ann. c. 16. § 15. reciting that it had been doubted whether, since the statute of frauds, the declarations or creations of uses, trusts, or confidences of any fines or recoveries, manifested by deed, made after the levying or suffering of such fines or recoveries, were good and effectual in law; it is thereby declared, "that all declarations or creations of any uses, trusts, or confidences of any fines or common recoveries of any lands, &c., manifested and proved by any deed then made or thereafter to be made, by the party who was by law enabled to declare such uses or trusts, after the levying or suffering any such fines or recoveries, were and should be as good and effectual in the law, as if the said act had not been made.

24. A. and B. his wife levied a fine, and four years after they, by deed, declared the use of it, in which were the following words: —"All and every fine or fines levied or to be levied shall be to the uses of the deed." The Court held that this was a good declaration of the use of the fine; the jury having found that the fine was levied to the uses therein declared; and that, notwithstanding the statute of frauds, a subsequent deed was as good as it was before that statute was made. It is evident that this determination was founded on the statute 4 Ann.; though it is not mentioned." Bushell v. Burland, 11 Mod. 196. Holt's R. 733. Sugd. note to Gilb. Uses, 116.

25. It is observable that in the statute 4 Ann. the word deed only is used, and the word writing omitted; from which it has been contended that a deed is now necessary in all cases to declare the uses of a fine or recovery: but this statute does not repeal the 7th section of the statute of frauds, being only explanatory of it; and if taken literally can only be extended to declarations of uses made subsequent to a fine or recovery, and not to those made before. Idem 112.

26. It is now the usual practice, where a fine is intended to be levied to uses, to execute a deed previous to the fine in which the intended cognizor covenants to levy a fine, and a declaration is inserted in the deed, of the uses to which the fine, when levied, shall enure. Where a recovery is intended to be suffered, a deed is previously executed to make a tenant to the *præcipe*, in which is contained an agreement to suffer a recovery, and a declaration of the uses of it.

27. With respect to the persons who are capable of declaring uses; not only all those to whom the law gives a disposing power are capable of declaring uses; but also some who are incapacitated from conveying Who may declare Uses.

their estates by any of the common modes of assurance.

Infants. Beckwith's Case, 2 Rep. 56. 10 Rep. 42 *b.* Tit. 35. c. 5.

28. If an infant levies a fine, and declares the use of it, such declaration shall bind him, as long as the fine remains in force: for inasmuch as he was admitted by the judges to levy a fine, the law will permit him to declare the use of it, and such declaration will be valid as long as the fine.

29. But an agreement by an infant to levy a fine and suffer a recovery, when he came of age, to certain uses, will not operate as a declaration of the uses of such fine or recovery.

Tit. 11. c. 4. § 60.

30. Thus in the case of Nightingale v. Ferrers, a question arose whether the agreement entered into by Lord Ferrers's son, when an infant, amounted to a declaration of the uses of the fine and recovery; and it was declared by Sir J. Jekyll that it did not.

Frost v. Wolverston, 1 Stra. 94.

31. An infant covenanted to levy a fine by a particular time, to certain uses. Before the time he attained his full age, and levied the fine, and by another deed executed after he attained his full age, he declared it to be to other uses. The Court of C. P. held that the last deed was that which should declare the uses of the fine.

Married Women, Tit. 35 36.

32. As a married woman is allowed to join with her husband in levying a fine, and suffering a recovery, she is also allowed to join with him in declaring the uses of them; and although the wife be an infant, yet her declaration of the uses of a fine, if she is allowed to levy one, will bind her.

Bury v. Taylor, 2 Roll. Ab. 798.

If a husband alone declares the use of a fine, levied by him and his wife, of the wife's estate, it will bind the wife, unless her dissent appears; for when she joined her husband in the fine, it must be

5 Rep. 57 *a.* Haverington's Case, Ow. 6.

presumed that she consented to the declaration of uses.

If a wife joins her husband in selling her estate, and afterwards joins in a fine of it, to the vendee and his heirs; it will bind her, without any writing proving her assent. Lusher v. Banboug, Dyer, 290 *b.*

A husband and wife levied a fine of the wife's land to a purchaser; afterwards the husband alone declared the uses of it; the question was, whether the wife was bound by the declaration of uses. Swanton v. Raven, 3 Atk. 105.

Lord Hardwicke said, as no other deed was shown that declared different uses, and the uses declared did not vary from what the wife intended, it should bind her: therefore the bill which she had brought, after an acquiescence of fifteen years, since her husband's death, for possession; on suggestion that she was not bound by the fine, as she did not join in the declaration of uses, must be dismissed.

Where the wife dissents from her husband's declaration, it will be void, as to her: therefore if a husband and wife levy a fine of the wife's estate, and an indenture is prepared in the name of the husband and wife, declaring the uses of such fine, which the husband seals and delivers, but the wife refuses to do so, it will not bind her; because her refusal to execute the declaration of uses is a sufficient proof of her dissent. Webb v. Worsfield, 2 Roll. Ab. 798.

33. A declaration of the uses of a fine or recovery by a married woman alone, without the concurrence of her husband, is void; because a married woman being *sub potestate viri*, cannot declare the use without him. 2 Rep. 57 *b.* Johnson v. Cotton, Skin. 275.

34. Where a husband and wife make different declarations of the uses of a fine or recovery, they are both void.

Beckwith's Case, 2 Rep. 56.

35. C. K. and Eliz. his wife being seised of lands which were the estate of Eliz., an indenture was executed by Eliz. without the consent of her husband, by which she alone declared the uses of a fine, which afterwards should be levied. Eight years after, the husband executed an indenture, without the assent of his wife, by which uses were declared, different from those contained in the deed executed by the wife. The fine was afterwards levied by the husband and wife to the persons mentioned in the deed executed by the wife; and it was found, that there were no other uses declared. Resolved, that both the declarations of uses were void; and that the fine enured to the use of the wife and her heirs.

2 Rep. 58 *a*.

36. It was also resolved in this case, that if the husband and wife agree in the declaration of the uses of part of the land, and vary in the declaration of the residue, it will be good for the part in which they agree, and void for the residue. But if there be a variance in the limitation of the first uses, though there be a similarity in the limitation of the subsequent uses, all is void. " For (says Gilbert) as to that part in which they both agree, all the requisites are found necessary to make a declaration, and the defect of the other part can have no influence on that which is good. But if they agree in the limitations for part of the estate in the land, and disagree in the other estates, there all is void: for else there will be another moulding of the estates than the *feme* designs; and her consent is requisite to every estate that shall be created by the limitation of uses; for it is to be ordered by her direction. Thus, if the husband declares the uses to himself and wife for life, the remainder to the heirs of the wife; and the wife declares the uses to herself for life, and then to her own

Uses, 246.

right heirs; both declarations are void; and it shall not stand good for the remainder in fee, and be void for the rest; for the estate moving from the wife, whatever uses do take effect, must be by her direction and consent, and in the same manner as she pleases. Though the husband has power over the estate of the wife during coverture, yet if she declares the use one way, and he another, his declaration is absolutely void, and it shall not stand good during the coverture. The reason of the difference seems, that in other cases, the husband having power over the wife's estate, he may grant an interest, as from himself, during the coverture; for so long he has power over the estate. But when they levy a fine in fee, the estate passes solely and entirely as one estate in fee simple from the wife; and the uses that are declared thereupon must be all with the consent of the wife, for the whole estate; because the whole estate and interest passes from the wife."

Idiots and Lunatics.

37. If an idiot or lunatic is permitted to levy a fine, or suffer a recovery, he may declare the uses of it. Because a fine and recovery being matters of record, no averment of idiocy or lunacy is admissible against them. But in cases of this kind, as well as in that of an infant, the Court of Chancery will relieve.

Tit. 35 & 36. Hob. 224.

The Right to declare Uses is co-extensive with the Estate.

38. The right of declaring the uses of a fine or recovery is precisely co-extensive with the quantity and nature of the estate or interest which each of the parties has in the lands.

2 Rep. 57 *b.*

39. If therefore a tenant for life and the person entitled to the remainder or reversion join in levying a fine, or suffering a recovery, they may declare the uses according to their respective estates in the land.

Noy R. 20.

2 Rep. 58 *a*. Palm. 405.

40. So if there be two joint tenants who join in levying a fine, or suffering a recovery, and one declares the use in one manner, and the other in another; each of them shall be good for their respective parts. Because the declaration of the uses shall be directed and governed according to their several estates and interests.

Roe v. Popham, Doug. 24.

41. It was held in a modern case, that where a fine was levied by a tenant for life, remainder-man in tail, and reversioner in fee; a declaration of uses by the tenant for life, and the remainder-man in tail, did not bind the reversioner.

Uses may be declared on a Lease and Release.

42. It was resolved in Samme's case, 13 Rep. 55., that upon a release which creates an estate, a use may be limited; but that upon a release or confirmation, which enures by way of *mitter le droit*, no use can be limited. It follows, that a use may be declared on a lease and release in fee; for in that case, the release creates a freehold estate: and it has been the constant practice for the last century to make all settlements by a bargain and sale for a year, with a release in fee to trustees, and to declare the uses upon that conveyance; in which case the uses arise out of the seisin of the releasees, and are usually declared in the same deed.

Cases and Opinions, vol. 2, 288.

43. It should however be observed, that no person can declare uses on a lease and release, who is not capable of transferring lands by that mode of conveyance. Therefore, a declaration of the uses of a release by an infant, a married woman, an idiot or lunatic, would be void; because an averment of these disabilities might be made.

The Releasee cannot dissent.

44. In the case of a lease and release to uses, the seisin is in the releasee, without any agreement or assent on his part, and will serve the uses declared

on the release: nor will a subsequent disagreement by the releasee, defeat the uses declared in the release.

45. Thus it is said in Roll's Ab. to have been resolved, that if a man seised of lands in fee, with intent to convey to B. in fee, for money, demises, grants, bargains, and sells it to A. for years, and after releases in fee to A. to the use of B. in fee; this release is good before any agreement of A. to have it as a bargain and sale. And if A. after elects to have it as a lease at common law, yet he shall not devest the estate of B. thereby. For, *prima facie* by the intent of the lessor, A. being only named as a means of conveyance for the settlement of the land to B., was possessed as a bargainee; and when the release has settled the estate in B., A. cannot, by his election, make it void.

vol. 2. 787. Gorton's Case, Gilb. Uses, 224. 505. 3d Edit.

TITLE XXXII.

DEED.

CHAP. XIII.

Of Powers of Revocation and Appointment.

1. *Common Law Powers.*
3. *Powers derived from Uses.*
5. *Powers relating to the Land.*
6. *Appendant.*
10. *Or in Gross.*
12. *Powers collateral to the Land.*
14. *In what Deeds inserted.*
15. *By what Words created.*
24. *A Power to appoint implies a Power to revoke, not e contra.*
26. *But includes a Right to reserve a new Power.*
28. *Unless the Power be collateral.*
30. *To whom Powers may be given.*
31. *Infants.*
33. *Married Women.*
46. *Who may be Appointees.*
48. *A Power does not suspend the vesting of Remainders.*

SECTION 1.

Common Law Powers.

POWERS or authorities by which one person enabled another to do an act for him, were well known to the common law; and were divided into two sorts; naked powers, or bare authorities; and powers coupled with an interest. Thus Littleton § 169. says, a man may devise that his executors shall sell his land, in which case, the power is a naked one. 1 Inst. 113 a. And Lord Coke, in his Comment, observes, that if a man devises lands to his executors, to be sold; this is a power coupled with an interest.

2. There is a material difference, in common law powers, between a naked power or bare authority, and a power coupled with an interest. In the case of a naked power, if it is exceeded in the act done,

it is entirely void. But in that of a power coupled with an interest, it is good for so much as is within the power, and void for the rest only. Jenk. 205.

3. With respect to powers derived from the doctrine of uses, it has been stated in a former title, that powers of revocation and appointment may be inserted in conveyances which owe their effect to the statute of uses; and that when executed, the uses originally declared cease, and new uses immediately arise to the persons named in the appointment, to which uses the statute transfers the legal estate and possession. Powers derived from Uses. Tit. 11. c. 4. § 4.

4. Powers being found to be much more convenient than conditions, were generally introduced into family settlements. And although several of these powers are not usually called powers of revocation, such as powers of jointuring, leasing, and charging settled estates with the payment of money, yet all these are in fact powers of revocation; for they operate as revocations, *pro tanto*, of the preceding estates.

5. Powers of revocation and appointment may be reserved, either to the original owners of the land, or to strangers; from whence arises the general division of powers, into those which relate to the land, and those which are collateral to it. Powers relating to the land are those which are given to some person having an estate or interest in the land over which they are to be exercised. These are again subdivided into powers appendant and in gross. Powers relating to the Land.

6. A power appendant is where a person has an estate in land, with a power of revocation and appointment, the execution of which falls within the compass of his estate: as where a tenant for life has a power of making leases in possession. Appendant. Hard. R. 415.

Clere's Case, 6 Rep. 17 *b.*

7. If a person limits his estate to such uses as he shall appoint by his will, and in the mean time to the use of himself and his heirs; the settlor has a qualified fee, and a power of appointment appendant to his estate.

Goodill v. Brigham, 1 Bos. & Pul. 192.

1 Ves. Jun. 637. 10—254.

8. In a modern case, the Court of Common Pleas was of opinion, that a power of appointment annexed to an estate in fee simple was void, as being inconsistent with the estate. Lord Eldon has denied this doctrine, and said, it had been long settled that a person might reserve to himself a power of limiting an estate by an appointment, taking at the same time to himself the whole interest in the fee, over which the power was to be exercised.

MSS. of Mr. Butler.

9. In an opinion of Mr. Fearne's, he says, the reservation of a power of appointment of an use, is not rendered void by a subsequent limitation of the fee to the same person. It was a mistake to suppose that a limitation of the fee comprehended every power of appointment whatever. For a person seised in fee could not, by a mere instrument in writing, pass the fee to, or make it vest in another, but a proper form and mode of conveyance was requisite; whereas under a power of limiting the use, a person may, by such instrument only, vest the fee in another, without any of the usual ceremonies requisite to a conveyance of lands.

Or in gross.

10. A power in gross is, where a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate; but not withstanding is annexed in privity to it, and takes effect in the appointee, out of an interest vested in the appointor.

11. Thus where a tenant for life has a power of creating an estate, to commence after the determina-

tion of his own, such as to settle a jointure on his wife, or to create a term for years, to commence after his death; these are called powers in gross; because the estate of the person to whom they are given, will not be affected by the execution of them.

Edwards v. Slater, Hard. 410.

12. Powers collateral are those which are given to mere strangers, who have no interest in the land: thus where powers of sale and exchange are given to trustees, in a marriage settlement; they are said to be collateral to the land.

Powers collateral to the Land.

13. A power relating to the land, being part of the old dominion, is favourably expounded; whereas a power collateral to the land is considered as a bare authority, and therefore construed strictly.

Cowp. R. 263.

14. Common law powers, or authorities, may be inserted in every kind of deed; but powers derived from the doctrine of uses can only be inserted in deeds deriving their effect from that doctrine, and operating by transmutation of possession, that is, in declarations of uses of fines, recoveries, and releases; for it is doubted whether powers can be inserted in deeds of bargain and sale, or covenants to stand seised.

In what Deeds inserted.

infra, c. 15.

15. In the creation of powers there is no necessity for any technical words; as it will be sufficient if the intention of the person who creates the power be clearly manifested.

By what Words created.

16. Thus where the words—"and if the said A. B. shall make any estate in fee simple, or fee tail, then the use shall be, &c." were inserted in a deed, without mentioning any particular lands; it was resolved that they should be intended of the lands comprised in the deed; and were sufficient to create a power.

Snape v. Turton, 2 Roll. Ab. 262.

Moo. 611.

17. So where the words were—"It shall be lawful for B. to alter, change, &c. any use, and to limit new;" or "that after altering, changing, &c. said uses, the fine shall be to the uses newly limited;" they were held sufficient to create a power.

Epis. Oxon. v. Leighton, 2 Vern. 377.

18. A. on his marriage with B. conveyed lands to C., in trust for himself for life, remainder to B. for life, remainder to the heirs of their two bodies, remainder to A. in fee; with a proviso, that in default of issue of the marriage, C. should convey to such uses as the survivor should appoint. A. devised the land to D., and died without issue. Lord Keeper Wright said, that Dyer's *scintilla juris* remained in C.; and though the proviso was unskilfully penned, yet it amounted to a power of revoking, and limiting new uses.

Holt v. Burleigh, Prec. in Cha. 293.

19. A man made a settlement upon the marriage of his son with one B., in which there was a proviso, that if B. should happen to survive her husband, not having issue, or without issue of their two bodies lawfully begotten, B. to have power to sell and dispose of such lands. The husband died leaving issue. Some years after, that issue died without issue, and then the wife sold the lands. A bill was brought by the heir of the husband, to have the deeds from the vendee, as not coming in pursuant to the power; and it was insisted for him, that the husband leaving issue, the wife did not survive her husband, not having issue, or without issue; and therefore the power never took effect. The Lord Chancellor said, there was no occasion in this case to make any artificial construction of the proviso, for that the words thereof fell in naturally with the meaning of the parties, and gave her a power to sell, when the issue

failed. For where an estate is made to a man, and the heirs of his body, and if he die without issue, or without heirs of his body, the remainder over, this is a good limitation, whenever the issue fails; though in that case, if he leaves issue, he cannot properly be said to die without issue. But this was a much stronger case, for death is a single act, and to be performed but once, and though the issue dies without issue, a year after, it cannot be said he died without issue, because he actually left issue; and yet a limitation over in such a case is good: but her surviving was a continuing act, and she survived her husband as much a year after his death, as she did the first moment; and therefore, if the issue fails during her life, she actually survives without issue, or not having issue, because the issue fails during her survivorship, which continues after the failure of issue: and this was the plain and natural meaning of the words, and agreed with the intention of the parties; which was to give her the disposal of so much lands, in case the issue to be provided for by the settlement failed. And therefore dismissed the plaintiff's bill.

20. Where a person has a power to charge lands with a sum of money, he may also charge it with the payment of the interest. For the intention is, that the land should be charged with the principal money, and that of course must carry interest, otherwise it could not be raised.

Kilmarry v. Geery, 2 Salk. 538. Boycot v. Cotton, 1 Atk. 552. Lewis v. Freke, 2 Ves. Jun. 507.

21. Where a power is given to trustees to raise a sum of money out of the rents and profits of lands, they may raise it by sale or mortgage; especially where it is to be raised by a certain day, and the annual profits would not be sufficient to raise it, on that day. But where the words are to raise a sum

Trafford v. Ashton, 1 P. Wms. 415. Joy v. Gilbert, 2 P. Wms. 13.

of money out of the annual profits, there the trustees cannot sell or mortgage.

Beale v. Beale, 1 P. Wms. 244.

22. Where there was a power to charge lands with portions for younger children, living at the father's death, a child, *in ventre matris*, was considered within the power. For it might be well looked upon, in equity, to be living at the father's death, *in ventre matris*.

23. With respect to common law powers, created by devise, they will be discussed in Title 38. *Devise.*

A Power to appoint, implies a Power to revoke, not *e contra*. Ward v. Lenthal, 1 Sid. 343. 1 Cha. Ca. 242. 2 —— 46.

24. Although a power of appointing new uses, implies a power of revoking the former ones; because otherwise the power of appointing new uses could not be exercised; yet a power of revocation alone, does not imply a power of appointing new uses.

Anon. 1 Stra. 584.

25. This doctrine was contradicted by Lord K. Finch, who held, that if A. reserved a power to revoke, without saying any thing of limiting new uses, yet he might limit new uses. But Sir J. Strange reports, that upon a trial at bar, the Court of King's Bench was of opinion, that a power of revocation alone, did not enable a person to limit new uses. If, upon such revocation, the person revoking became seised in fee, he might dispose of the lands by deed or will; but not by a new declaration of uses.

But includes a Right to reserve a new Power. Hatcher v. Curtis, 2 Freem. 61.

26. A power of appointment, which relates to the land, includes a right to appoint either absolutely, or with a new power of revocation and appointment. But if a person once executes a power of revocation, and makes an appointment of new uses, by deed, over the whole estate, his power is thereby completely exhausted; unless he reserves to himself a new power of revocation and appointment.

Hele v. Bond, 1 Ab. Eq. 242.

27. Sampson Hele, being seised in fee of the lands in question, conveyed them in 1684, by lease and

release, and fine, to trustees; to the use of himself for life, remainder to the use of his son for life, remainder over. In the release there was a power given to Sampson Hele, to revoke the uses contained therein, and to limit other uses; and also to revoke or alter such new limitations, and to declare other uses. Sampson Hele did accordingly, by deed poll, in 1687, reciting his power, revoke the uses limited in the release of 1684, and appointed new uses: and by an indenture in 1704, between him and trustees, reciting the release of 1684, and the power of revocation therein, and also the deed poll of 1687, by which he had revoked the first uses, and limited new ones; did, according to the power and authority to him by the said recited indenture reserved, and the proviso therein specified, revoke the uses limited by the deed poll, and by virtue of the said power appointed new ones. The question was, whether the deed poll of 1687, and the uses thereby limited, were well revoked by the indenture of 1704. The Lord Chancellor declared, that this was a new case: that he did not find any authority to warrant such a revocation; nor was there an instance, in any of the authorities which were insisted on, of any such power of revocation. But referred it to the Judges of the Court of King's Bench, for their opinion; whether the uses limited by the deed poll of 1687, were well revoked by the indenture of 1704, by virtue of the power of revocation contained in the indenture of 1684. The Judges of the Court of King's Bench certified their unanimous opinion to be—"That the power of revocation in the indenture of 1684, was fully executed by the deed poll of 1687; and that the farther power in the indenture of 1684, to revoke any new appointment of uses, was void in its crea-

Prec. in Cha. 474. Printed Cases, Dom. Proc. 1717.

tion, as to such uses as should afterwards be duly limited, unless a power of revocation should be again expressly reserved, which was not in this case; and consequently, that the uses limited by the deed poll of 1687, were not revoked or annulled by the indenture of 1704." The Lord Chancellor concurred in this opinion, and decreed accordingly. The decree was affirmed in the House of Lords.

Unless the Power be collateral.

28. Where the power is collateral to the land, the person to whom it is given cannot, upon the execution of it, reserve to himself a new power of revocation.

Wall v. Thurborne, 1 Vern. 355.

29. Sir George Crook having three daughters, declared by his will, that his lands should descend and go amongst his daughters, in such shares and proportions as his wife should by deed direct and appoint. The wife made an appointment in pursuance of the power, in which she reserved to herself a power of revocation. The Court said, that as to the power of revocation, the case might be eased of that, for it was only an authority in the wife; and that being once executed, she could not reserve such power to herself.

To whom Powers may be given. 1 Inst. 52 *a*.

30. By the common law, powers and authorities may be given to persons who are in other cases incapable of disposing of lands, on account of particular incapacities and disabilities. For the execution of a naked power or authority cannot be attended with any prejudice to the persons labouring under such incapacities; or to those for whose benefit the authority is exercised.

Infants.

Hollingshead v. Hollingshead, cited 2 P. Wms. 229.

31. Thus an infant is capable of executing a bare authority. And Lord K. Wright held, that a covenant entered into by an infant on his marriage, was a good execution of a power. It is however now

settled, that where a power is given to an infant, relating to his own estate, it must be inserted in the deed, that he may execute it during his infancy; otherwise he cannot execute such power.

32. A person devised all his real estate to trustees, in trust to apply the rents and profits thereof for the sole and separate use of his daughter Mary, the wife of W. W., (whom she had married without her father's consent, and who was since become a bankrupt,) during her life, to be at her own disposal, and not subject to the control of her husband. And upon farther trust, that they should permit his said daughter, by any deed or writing to be by her duly executed in the presence of three credible witnesses, to give, devise, and bequeath all his freehold, copyhold, and leasehold estates, to such person or persons as his daughter should think fit; she having a particular regard to his poor relations. Mary, the daughter, living separately from her husband, and having one child by him, did, when of the age of nineteen, in pursuance of the power given her by her father, by will, devise all her real and personal estate to her executors, upon trust for her child, and her other relations. The question was, whether this power, derived to Mary under her father's will, was well executed by her during her infancy?

Hearle v. Greenbank, MSS. Rep. 3 Atk. 695.

Lord Hardwicke.—This is a question of great consequence, and never determined before. And as I can find no precedent that a power of this sort, derived under a will, can be executed by an infant, I am unwilling to make one. There are cases indeed, where infants may execute powers, but there they are mere instruments, and no interest passes from them; as is said, 1 Inst. 52 *a.*, that infants may be attornies to give seisin. Though in fo. 128 *a.* it ap-

pears by a quotation from the Mirror, that by the old law they could not be attornies, nor (fo. 158 *a.*) even summoners. But powers like the present are of a very different nature, being introduced since the statute of uses, and coming in the place of conditions, before that statute. Hence it is that conditions and powers are often compared. Now conditions could be executed by infants; but that was only where it was for their benefit. So an infant may present to a church; but that is very different from a power of this sort, for it may be done by a child of a month old, because he is under the inspection of his guardian, and the bishop is judge of the sufficiency of the person presented. But it cannot be pretended that such a power, as the present, could be executed by a child of one month old. An infant's declaration of the use of a fine is good also, while the fine stands unreversed for infancy, because both make but one conveyance, and the law gives credit to the judge who took the fine. The custom of gavelkind that an infant may make a feoffment at fifteen, is very different; and bears no resemblance to the present case. Particular customs being *lex loci*, and the same as if an act of parliament was made for that purpose. In Lord Buckhurst's case, Moor 512. it is said *arguendo* by him as counsel, that where an infant may by custom make a feoffment at 15, if he makes a feoffment to the use of his will, such will, though void as a will, on account of his infancy, is still a good declaration of uses. This looks as if an infant could execute such a power as that in question; but he cites no authority for what he says, nor can I find any to that purpose, but rather the contrary. Bro. Custom, 50. said there, that though an infant may make a feoffment of gavelkind

vide Tit. 21. ch. 2. § 24.

lands at 15, yet he cannot devise them, for the custom shall be taken strictly. And 2 Roll. Ab. 779. that if an infant make a feoffment of gavelkind lands, warranted by the custom, to the use of himself, and afterwards devises the use, this is void, if not warranted by the custom; which last is almost a contradiction of what is said by Moor. In the case of feme coverts, executions of powers have been held good. So they were determined to be in Rich v. Beaumont by Lord King, and afterwards by the House of Lords; and in Lady Travel's case also, by Lord King Thence it was inferred they should also be good in case of infants, the disability of feme coverts being, as was said, rather greater than that of infants. But I think this latter disability a greater one in the eye of the law; and so is Lord Hobart in Moore v. Hussey, in marg. (which marginal notes are well known to be Lord Hobart's own), who says, that coverture was not at common law so far protected as was infancy, and some other disabilities. Upon the ground laid down there, is founded the separate examination of feme coverts upon fines, which is otherwise in case of infancy; for the feme covert has no less judgement, as Lord Hobart says, than if discovert. So in 1 Inst. 246. it was held, that a feme sole being disseised, and afterwards taking husband, and during the coverture a descent cast, her entry is thereby taken away, after her husband's death; but otherwise if she was within age at the time of her taking husband; for that no folly can be imputed to her, she being an infant at the time of her marriage. And in 10 Co. 43 *a.* it is held, that an infant is totally disabled from conveying during his minority; and there a difference is taken between recoveries suffered by husband and wife, and by infants; that in the first case, they are

infra, § 40.

Hob. 95.

good, but not in the other. It was said, that here the infant was of the age of 19, and the Court might judge of her discretion; but that rule lets in much too great a latitude, nothing being more vague and uncertain than the different abilities of people at the same age. Some certain age must be fixed by law for presuming discretion; and so it must be to make good a custom, enabling an infant to dispose; as is
Hob. 225. laid down in Needler v. Ep. Winchester. If infants could execute powers over their estates, there would be instances of leases or jointures made by them; whereas we daily see applications made for acts of parliament, enabling them thereto. I can find but one case of a power executed by an infant, that is Lord Kilmurry v. Gery, cited in Evelyn v. Evelyn, 2 P. Wms. 671. It was in 1712, as appears from the Register's book. There was a private act of parliament, 12 Will. III., making good all acts done by Lord Kilmurry, during his infancy; and is therefore by no means an authority, that infants may execute such a power as this. This is my opinion as to the general question; but there is something in this case that still strengthens it, from the words of the will, which go throughout to the disability of coverture, and none other, and imply therefore, that had he meant any other, he would have mentioned it. The testator's plain view was to secure his estate to the separate use of his daughter, who was then a strong young woman, not at all likaly to die, and it cannot be presumed he had her death at all in view. This is a power coupled with an interest, and so different from a naked authority. The daughter had an equitable interest in her for life, with a power of giving the inheritance to whom she pleased. The equitable reversion remained in her, and if not disposed of by

her, would descend to her daughter; which shows it to be a power that was to be executed over her own inheritance.

33. A married woman may, without her husband, execute a naked authority; whether given before, or after her coverture; though no special words be used to dispense with the disability of coverture. Thus Lord Coke says, if *cestui que use* had devised that his wife should sell his land, and made her executrix, and died, and she took another husband; she might sell the land to her husband: for she did it *in auter droit*, and her husband should be in by the devisor. Married Women. 1 Inst. 52 *a*. 112 *a*.

34. The rule is the same where both an interest and an authority pass to the wife; if the authority be collateral to, and does not flow from the interest. Because there the two are as unconnected, as if they were vested in different persons.

35. A person devised an annuity to a feme sole for life, with power to grant an annuity to any person she should name. The woman afterwards married. It was held that this power continued in her, and was not transferred to the husband. For by her nomination she did not anyways charge the lands by virtue of any interest arising from her; but under the power that was given to her for that purpose. Gibbons v. Moulton, Finch, 346.

36. Where lands are vested in a married woman, upon condition to convey them to others, she may convey them during the coverture, to save the condition. W. Jones, 138.

37. If the legal estate in lands is vested in a married woman, in trust for another, some hold that she cannot pass it to the *cestui que trust*, unless her husband joins. This was the opinion of Judge Jones; but Whitlocke and Doddridge dissented, and held that the husband's joining was not any more requisite, Daniel v. Ubley, W. Jones, 137.

1 Inst. 112 a. n. 6.

than in the other cases. Mr. Hargrave has observed, that perhaps Jones's opinion may be most conformable to strictly legal doctrine; and his thus distinguishing a trust from a power, and a condition, may be accounted for. Trusts are properly the subjects of consideration for the courts of equity only; and though in them the legal estate is made subservient to the trust, yet the courts of law take notice of trusts for very few purposes, nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts.

38. When powers of revocation and appointment were introduced into conveyances to uses, the judges reasoned by analogy from these principles, and held that coverture did not create an incapacity in a woman to execute a power.

Bayley v. Warburton, Com. Rep. 494.

39. A person settled lands on himself for life, remainder to his wife for life, remainder to the issue of the marriage; with a proviso that it should be lawful for his wife, during her life, to demise the premises, under certain conditions. After the husband's death, the wife married again, and she and her husband demised the lands pursuant to the power. It was held in the Exchequer, that this was a good execution of the power, notwithstanding the coverture: for the estate of the lessee was not derived from the estate of the lessor, but arose out of the estate of the feoffees or releasees, in the original settlement.

Rich v. Beaumont, 6 Bro. Parl. Ca. 152.

40. In a subsequent case Lord King held, that where a power was given to a woman to dispose of her estate by will, her marriage suspended the power. And on an appeal to the House of Lords, a case was directed to be made for the opinion of the Judges of the Court of King's Bench; but it does not appear

whether any farther proceedings took place. It is however observable, that in the case of Hearle v. Greenbank, Lord Hardwicke says, it was held in this case that a married woman may execute a power. ante, § 32.

41. If however a power be expressly reserved to a woman, to be executed by her, being sole; a subsequent marriage will in that case suspend the execution of the power.

42. An unmarried woman settled her estate on herself for life, remainder over, reserving to herself a power, being sole, to make leases for three lives. She afterwards married, and executed the power jointly with her husband. This execution was held not to be pursuant to her power: for by the marriage she became subject to her husband. And the Lord Keeper took a diversity between a naked power, and a power that flows from an interest: for where a bare power is given to a feme by will, to sell lands, although she afterwards marries, she may sell the lands, even to her husband. But where a woman, upon a settlement of her own estate, reserves a power, which flows from an interest, that power ought to be executed by the woman whilst sole: and yet he said such powers ought to be taken liberally, though formerly they were taken strictly. Antrim v. Bucks, 1 Ab. Eq. 343. ante, § 33.

43. It is now usually inserted in the deed by which the power is created, that a woman shall be enabled to execute it, whether she be sole or married; in which case a subsequent marriage will not disable her from executing it.

44. The proper mode of creating a power of this kind, is to convey the lands to trustees in trust for the separate use of the woman, remainder to the use of such persons as she shall by deed or will, whether she be sole or covert, appoint. But though no such

conveyance be made, and articles only are entered into, previous to a marriage, by which it is agreed that the wife shall have a power to dispose of any estate which may descend to her, it will be sufficient; and a court of equity will support the execution of a power so given.

Wright v. Cadogan, 1 Bro. Parl. Ca. 486. Amb. 468.

45. By articles before marriage, the intended husband covenanted that he would execute all such acts and conveyances as should be necessary for vesting any estate which might descend to his wife, in such persons as his wife should name, in trust for her sole and separate use; and to be subject to such disposition as she should make thereof, by any deed or writing under her hand and seal, or by her last will and testament. The wife became entitled to a trust estate in some lands, which she devised by her will. It was decreed by Lord Northington that the power was well created, and that the will of the wife was a good execution of it.

On an appeal to the House of Lords, it was contended on the part of the appellant, that the proper and only methods of enabling a feme covert to dispose of her inheritance by deed or will, operating as an appointment, were, either by a conveyance to uses or trusts before marriage, reserving such a power; or else by fine levied by the husband and wife after the marriage, with a deed to lead the uses of it, reserving such a power to her, over the inheritance vested in the cognizees: but unless one of these methods was taken, her will of real estates would be void, as an instrument of conveyance, and could not bind her heirs. Marriage articles being entered into for a valuable consideration, would bind the husband to do all proper acts for enabling his wife to make an effectual disposition of her real estate, notwithstanding

her coverture; but when those acts had not been done, the heirs of the wife would be entitled to take advantage of all defects in the will, or in the capacity of the testatrix; just as they would have been entitled to claim by descent, in case, after a power duly reserved to her over a use, or a trust, she had not thought fit to make any appointment in execution of the power.

On the other side it was argued, in support of the power, that the legal estate was outstanding in trustees, and therefore no formal conveyance of it was by any means necessary, as such conveyance could not affect the legal estate, or have any legal operation. It could amount only to a direction to the trustees to become trustees for such persons, intents, and purposes, as the wife should by deed or will appoint; and as the interest of the wife was only equitable, the general agreement and intention of the parties, clearly and indubitably expressed in the articles, were as strong and binding as an equitable conveyance, and did in effect amount to a direction to the trustees and their heirs, to stand seised of the premises, in trust for such person and persons as she should appoint, and, in the mean time for her separate use, exclusive of her intended husband; and especially as the husband, by the articles, actually covenanted to do all necessary acts to enable his wife to make any such disposition or appointment of her estate as she should think fit, either by deed or will; by which covenant he was bound in equity to do all necessary acts for authenticating or establishing any deed or will, which she should make. The decree was affirmed. Doe v. Staple, 2 Term R. 684.

46. With respect to the persons to whom appointments may be made, all those who are capable of Who may be Appointees.

making lands by any common law conveyance, may be appointees. A woman may also take by an appointment from her husband; because she does not take immediately from him, but from the trustees.

A Power does not suspend the vesting of Remainders.

48. It frequently happens that estates are subject to a power of appointment, in the first taker, with remainders over, in default of such appointment; upon which an opinion has obtained, in some instances, that such a power suspended the effect of the subsequent limitations, and kept them in contingency, instead of their being immediately vested, subject to be divested by a subsequent execution of the power. But this doctrine has been altered.

49. By marriage articles, money was agreed to be laid out in the purchase of lands, to be settled to the use of the husband for life, remainder to trustees during his life, to preserve contingent remainders; remainder to the wife for life, remainder to all and every the children of the marriage, for such estates, and in such proportions as the husband and wife, or the survivor, should appoint; and in default of appointment, to be equally divided among the children; if more than one, as tenants in common, with cross remainders; if but one child, then to such one in tail; and in default of issue, to the husband, his heirs and assigns for ever. Upon a question, whether the inheritance in the lands to be purchased would have vested in the father, it was contended it would not, because during his whole life the inheritance, supposing a purchase made, would have been in abeyance; for as he might have limited it to any child, in fee, and the limitation over in default of appointment would then have been out of the question, it was a springing use, resting in suspence during his life. But Lord Hardwicke held, that the father

taking an estate for life, by the same settlement, the inheritance would have vested in him. He said, that where no person was seen or known in whom the inheritance could vest, it might be in abeyance. That the fee's being in abeyance, had in some cases occasioned sn act of parliament to remedy it, but there it was not so; nor did the power of appointment make any alteration therein; for the whole effect thereof was, that the fee, which was vested, was thereby subject to be divested, if the whole was appointed; or if part, so much as was not drawn out of the inheritance, still remained in the father, as part of the old fee: and there was no occasion to put the inheritance in abeyance, which the Court never did but from necessity; and would so mould it, by opening the estate, as in Lewis Bowles's case, and in several others, as best to answer the purposes of the limitations; but if the appointment was not made, it remained undisturbed. Tit. 16. c. 1. § 51.

50. Mr Fearne has observed, that this was not a case in which the estate was originally the father's, or vested in him at all, before the settlement: where the limitation of the fee to him, being the reversion, and part of his old estate, would have remained vested in him, till divested by the vesting of a contingent remainder. But it was the case of money to be laid out in lands, where the father's title to the inheritance was to originate in the same settlement as the limitations to the children; and by which, as Lord Hardwicke observed, as the father took also an estate for life, the inheritance, according to the ordinary rules, vested in him. But the general doctrine has been confirmed in the following case. Cont. Rem. 346.

Doe v. Martin, 4 Term Rep. 39.

51. By marriage settlement, lands were limited to the use of the intended wife and her heirs, till the marriage; afterwards to her separate use for her life, remainder to her husband for life, remainder to all the children of the marriage, or such of them, for such estates, and in such shares, as the husband and wife, or the survivor, should by deed appoint; and for want of such appointment, then to the use of all and every the child or children equally. Upon a question, whether the remainders to the children were vested or contingent, it was contended that the power of appointment prevented their vesting, by absorbing the whole fee.

Lord Kenyon after observing, that the judgement must depend on the authorities cited, of which the three leading ones were Leonard Lovie's case, Walpole v. Lord Conway, Barnad. Rep. in Chan. 153. and Cunningham v. Moody, and noticing the opinions in the two last, said he was happy to find that in the last of these cases, where Lord Hardwicke had an opportunity of re-considering this question more fully, and at a time of life when his judgement was more mature, he determined differently from the opinion held in the two former. He could not find any substantial distinction between that case, and the principal one. That the limitations to the children were first subject to a power of appointment to the children, &c. and whether the limitations preceded or followed the power of appointment, made no difference. That the opinion of Lord Hardwicke, in the latter case, was peculiarly deserving of attention; because, when it was discussed, the former one, of Walpole v. Conway, where he had intimated a different opinion, was

Tit. 16. c. 8. § 3. ante, § 49.

pressed upon him; and because he decided the last case at a time when he had the assistance of some of the most eminent lawyers, that ever attended the bar of that Court. Lord Kenyon therefore thought, that on the authority of that case, the remainders to the children were vested, subject to be divested by the execution of the power, and judgement was given accordingly.

Doe v. Dorvell, 5 Term Rep. 518.

TITLE XXXII.

DEED.

CHAP. XIV.

Of Powers to jointure.

1. *Origin and Nature of.*
3. *Restriction as to the clear yearly Value.*
6. *Proportioned to the Fortune of the Wife.*

SECTION 1.

Origin and Nature of.

SOON after the statute of uses, the practice of limiting estates in strict settlement became frequent; but as estates for life are not subject to dower, a power was usually given to tenants for life, of appointing an estate to any woman whom they should marry, for their lives, by way of jointure, which is now universally practised.

2. As a rent-charge is a much more convenient species of property than an estate in land, it is now the usual practice to give tenants for life, a power of appointing a rent-charge, not exceeding a certain sum, by way of jointure: and where the power is to appoint all or any part of the lands, the usual way is to appoint certain lands to the wife, with a proviso, that in case the person in remainder shall pay to the wife a certain yearly sum, out of the rents, as a jointure, then that he may retain the possession of the estate.

Restriction as to the clear yearly Value.

3. In powers of this kind, the common phrase is, that it shall be lawful for the tenant for life to appoint any part of the lands, comprised in the settlement, to his wife, as a jointure, not exceeding the

clear yearly value of a certain sum. And where an appointment of a jointure is made in this manner, clear of all taxes, and other outgoings, this refers to such outgoings and taxes as are in being at the time when the appointment is executed.

4. The Marquis of Blandford, having a power to appoint a jointure, not exceeding 3,000 *l.* a year, by articles previous to his marriage, covenanted to settle a jointure of 3,000 *l.* a year on his intended wife, over and above all reprises. A settlement was afterwards executed, by a deed of appointment of certain lands, in pursuance of the power; in which there was a covenant, that the lands should produce 3,000 *l. per annum*, clear of all reprises. Lady Blandford having survived the Marquis, brought her bill in Chancery, to have the lands appointed to her for jointure, made up a clear 3,000 *l.* a year.

Blandford v. Marlborough, 2 Atk. 542.

Lord Hardwicke said—There were two questions in this case. First, what was the true construction of the power. And secondly, what was the construction of the articles. The words of the power were, to settle upon any woman a jointure not exceeding 3,000 *l.* a year, without any deduction or abatement, for any taxes, charges, or impositions, imposed or to be imposed, parliamentary or otherwise. He thought both sides were mistaken in the construction of the power. For the plaintiff's counsel carry it too far in extending it to a clear yearly rent-charge; and have insisted upon deducting for every little sum laid out in manuring, or any way relating to the land. And, on the other hand, the defendant's counsel have narrowed it too much, by insisting that the words *taxes and impositions* ought to receive a limited and restrained sense; and mean such taxes as are fixed, and certain in their nature, which the land-tax is not, being a fluctuating one. He thought

the land-tax clearly within the power; for it would be very strange when there were the words, *imposed or to be imposed*, that the principal and most considerable public tax could be intended to be excluded. The best rule was to construe the power as referring to such taxes as were in being at the time the articles were executed. The jointure was not to exceed, in the whole, the annual value of 3,000*l.*; and in his apprehension the value of the land was to be estimated, as it stood at the time of the execution of the power: if by any accident, after the execution of the power, there should have been an excess, it would be for the benefit of the jointress. By parity of reason, if there should be any deficiency, by inundation or casualties, the jointress must acquiesce under it. To construe it otherwise, would make these powers executory. Upon the first question, therefore, the measure of the charges the jointured estate was to be freed from, must be taken from the valuation at the time of the execution of the power, and of such charges as were then in being.

As to the second question, respecting the construction of the articles, there was a great inaccuracy in not pursuing the power, nay, even the articles and the settlement had not so much as the same words, but differed in many places, and yet they ought both to be construed, so as to make them consistent; and by this means he should have some reason for what he said, and some foundation to stand upon. On the part of the defendant, an advantage had been attempted to be taken from the expression, that the jointure should be clear of reprises. Now the word reprises was of a very uncertain signification, and ought to be construed *secundum subjectam materiam*. The articles began with a recital of the power, and

the intended marriage, and the meaning of this inaccurate drawer under the word reprises, was to take in taxes, charges, or incumbrances, imposed or to be imposed, parliamentary or otherwise, according to the subject-matter, and pursuant to the power to which it referred. Nothing was clearer than that the marquis intended to settle 3,000 *l. per annum*, free from all taxes whatsoever; and if the construction of the articles should be doubtful, from the uncertain signification of the word reprises, yet taxes, inserted in the settlement, might explain the meaning. And this way of reasoning would hold better in a court of equity, because articles were there considered as minutes only; and the settlement might afterwards explain more at large the meaning of the same parties. He therefore declared, that the plaintiff, by virtue of the power under the duke's will, and the marriage articles, was entitled to such a jointure out of the trust estate, subject to the said power, as at the time of the execution of the said articles was of the yearly value of 3,000 *l.* free from all incumbrances, rent-charges, rents-seck, fee-farms, quit-rents, annuities, stipends to ministers, pensions, and procurations, payable thereout; and also free from all parliamentary taxes or impositions of such nature and kind as were in being at the time of executing the said power, and particularly from the land tax then in being.

5. A case of the same kind having arisen some years after, Lord Hardwicke said, the question was, what the jointure should be clear and discharged from. The material words were, not exceeding in the clear yearly value. What was the meaning of those words, and to what time to be applied? The time he would consider first; as to which he was clearly of opinion that they must be lands of this clear yearly value at the time of making the jointure;

Tyrconnel v. Ancaster, 2 Ves. 502. Amb. 237.

and that there was no obligation upon the remainder-man, or lien upon the estate to have this jointure continue to be of a clear value, during the continuance of the jointure estate; and that was always the rule in the execution of these powers. A man seised in fee might covenant that it should always continue of such a value, which covenant would bind his assets, real and personal, to make it good: but there was nothing to bind the estate, except what was laid down in Coventry v. Coventry; such a covenant as was a conveyance in equity. And of that opinion he was in Lady Blandford's case, where it was very minutely considered, as to the great inconvenience in a contrary doctrine: that these powers would otherwise be executory and fluctuating: that none would know when the power was executed; and that new bills must be brought against the remainder-men, and it must be executed against subsequent tenants for life. Were subsequent jointresses to be called upon to make good the first jointure? that could never be intended. Therefore it was the time of the execution; and of that opinion he was in that case, not only in respect of the execution of the power, as to charges on the estate, but in respect of the *quantum* of the land tax; for though that tax might rise afterwards, the *quantum* of the jointure was not to be varied; and a defect in value of the jointure was not to be considered, because of an addition made to the land tax afterwards. It was sufficient that the Master should see it exonerated from the land tax, according to the *quantum* of the land tax at the time of the execution.

The great question then was, from what charges, impositions, or outgoings, this estate ought to be discharged, at the time of making the jointure. What it was to be discharged from, depended on the con-

struction of those words; *not exceeding*, &c. For the plaintiff it was insisted that it must be clear of every outgoing; clear at least as far as that jointure of Lady Blandford's, in which case the words were, clear of any taxes, charges, or impositions; so that there was an express discharge from taxes. If there had not, by virtue of the word charges, he could not have taken it to be clear of taxes. The plaintiff insisted this was to be clear of taxes; and if it was within the power, she was in the right; which brought it to the construction of the words. He was of opinion those general words were not to be extended to the land tax. But the true construction was the rule laid down in Lady Blandford's case, where he held that the measure of charges to be deducted, was to be taken, as things stood at the time of the execution of the power; and was to be free from all charges usually allowed between buyer and seller of estates, and all parliamentary impositions, at that time; but that was because of the words. But where nothing but the word clear was used, it was a right rule to construe it as it would be between buyer and seller of estates. Clear must not mean all outgoings, like a rent-charge, as losses by tenants and management, to which a rent-charge is not liable. Then what was the rule to go by; what would be understood between buyer and seller; all reprises and incumbrances, and all extraordinary charges, unusual, and not agreeable to the custom of the country; and then the land tax was not to be considered. It was true that the land tax was to be considered as a burthen; but it was contingent, in itself, because the value was contingent, and therefore that was a reason it ought to be taken in, but it was not in between buyer and seller. Tithe was such as it ought to be free from; so of a fee-farm

rent, which was an incumbrance by private title. Then as to the poor rates and church levies; if in the country where the lands were, the usual course of letting estates had been to let them subject to these charges, (as it was in the western counties,) he should have taken the power in that sense, that the jointure should be charged with those payments. For when a person created a power and made a jointure, as a clear jointure in lands, it must be considered as lands of a clear rent, according to the course of letting in that country; and not to be liable to extraordinary charges by contract. It was proved that in the country where the lands were, it was unsual to let them discharged of these burthens; but in this estate, these burthens were paid by the landlord, and the rents were raised to the tenant in proportion. If then the father thought fit to let the estate so as to increase the nominal value of it, and gave a power to make a jointure, that was no reason to burthen the jointure with it, but as the usual and ordinary method was of letting those lands.

It was decreed that Lady S. was entitled to a jointure, not exceeding the clear yearly value of 1000 *l.* at the time of the settlement made: clear of incumbrances, and all other charges which, by the course and usage of the country in which the lands lay, ought to be borne by the tenant; but subject to the land tax, and all other outgoings which, according to the course of the country, ought to be borne by the landlord.

Proportioned to the Fortune of the Wife.

6. Powers of jointuring are sometimes given proportioned to the wife's fortune; and if in a case of this kind the power be to appoint a jointure not exceeding 100 *l.* a year for every 1000 *l.* which the husband acquires as a marriage portion, and part of the wife's fortune is limited to the husband for life,

remainder to increase the younger children's portions, although there be no younger children, and it goes back to the wife, yet it will be considered as received by the husband, within the intent of the power; and the husband will be compelled to settle a jointure accordingly.

7. Sir B. Sherrard being tenant for life, with such power as is mentioned in the preceding section, married a lady who had a fortune of 10,000 *l.*; and in consideration thereof, settled an estate on her of 800 *l.* a year; and covenanted to settle 200 *l.* a year more, to make it up a thousand. The sum of 2,000 *l.*, part of the wife's fortune, was continued at interest, for the benefit of the younger children; and in case of no children, to go to the survivor; but the interest thereof was to be paid to the husband during his life. There were no children, and the wife survived. Tyrconnel v. Ancaster, 2 Ves. 499.

Lord Hardwicke said, the question was, whether Sir B. Sherrard was to be considered as having received 8000 *l.* or 10,000*l.* with his lady. He was of opinion he must be considered as having received a portion of 10,000 *l.* with his wife. It was not to be disputed but that on the marriage it was to be considered as 10,000 *l.*; but then the objection was, that 2000 *l.* though part of the portion, was not received by Sir B. S.; and that in consequence of the settlement, by his not surviving, it went back to her, there being no younger children, and was to be considered as no part of the portion on which the jointure was made; and therefore not being received, no jointure was to be made for it. But he was of opinion that objection did not hold: he agreed that where a jointure was to be made under such a limited power, of a portion to be received, the transaction must be fair, *bonâ fide*, without fraud or collu-

sion; and therefore if it was a nominal, not a real portion, that would not do. It often happened that a man married a lady with a small portion, and he or his friends advanced money to make up that a nominal portion, and took it back; that would not do. So if the wife had a portion of 10,000 *l.* and it was settled to her separate use, that would not do: but that was not the present case. Parents created these powers with a view to compel their children to marry prudently, with a wife of adequate quality, certainly of an adequate fortune; but not to burthen the estate with a great jointure for a wife, who brought nothing into the family, and who probably would not deserve it. Wherever therefore the portion of the wife was stipulated to be applied in a proper and reasonable manner, in the usual way of settling, for the benefit of the family, that was to be considered as a portion received. The father could not mean that every part of this portion should be received by his son, to spend and waste: if it was settled so as to become beneficial to the family, in the fair way of making settlements, it was sufficient. The parties were young at the time of the marriage, and might have several children: it was reasonable to take so much of the wife's fortnne, as an increase of the younger children's portions, which the husband had under his father's will a power to settle; nor was there any impropriety in giving the wife a chance of survivorship. This then was an application of the portion by the husband, in a reasonable and fair way, and therefore to be considered as within the intent of the power. If the interest of the 2,000 *l.* had only been given to the husband for life, and afterwards the principal to the wife, that would be a strong case to say it was not within the intent of the power;

but the money being only given to the wife, on failure of younger children, and on the husband's dying first, both which events happened, it differed from that case. If the portion was to be paid to the husband, to do what he pleased with, and not to be settled for the benefit of the family, fathers would hardly create such a power. He therefore considered that what was fairly settled for the family, was for the benefit of the husband; and therefore the widow was entitled to 1000 *l.* a year for her jointure.

8. It was resolved by Lord King, that where a tenant for life with power to make a jointure of 100*l.* a year for every 1000 *l.* which he had by his wife, covenanted on marriage to make a jointure accordingly; and also to make an additional jointure, on receiving or becoming entitled to any further money in right of the wife; and after the death of the husband the widow became entitled to an additional fortune; she shall not compel the remainder-man to make an additional jointure on her, on this account. But, on the other hand, the husband's creditors should not take from the wife that additional fortune. Holt v. Holt, 2 P. Wms. 648.

TITLE XXXII.

DEED.

CHAP. XV.

Of Powers to lease.

1. *Origin and Nature of.*
4. *Restrictions annexed to.*
5. 1° *As to the Instrument.*
7. 2° *As to the Lands to be leased.*
13. *A Qualification destructive of the Power dispensed with.*
21. 3° *As to the Time when the Lease is to commence.*
22. *A General Power only authorizes Leases in Possession.*
26. *Unless the Estate is Reversionary.*
31. *Does not authorize a Lease to commence after a subsisting Lease.*
36. *But concurrent Leases are good.*
40. *Of Powers to lease in Reversion.*
43. 4° *As to the Duration of the Lease.*
48. 5° *As to the Rent to be reserved.*
49. *What is the ancient Rent.*
56. *How to be reserved.*
61. *What is the best Rent.*
62. 6° *As to the Clauses and Covenants.*
70. *In what Conveyances they may be inserted.*

SECTION 1.

Origin and Nature of.

AS all leases made by tenants for life determine by the death of the lessor, powers are usually inserted in settlements, enabling the tenants for life to grant leases, to be valid against the persons in remainder, and the reversioner. Powers of this kind are productive of great advantage, not only to the persons interested, but also to the public; for tenants for life are thereby enabled to grant a certain term to the lessee, by which means they get a higher rent, which is equally beneficial to the remainder-men, and reversioner; and the public is benefited, because the

extent and security of the tenant's interest induces him to expend his capital in the cultivation and improvement of the estate.

2. But lest tenants for life should exert these powers to the prejudice of the persons in remainder or reversion, they are in general restrained by the words of the power from making leases, but on certain conditions; by which means they are forced to secure the same advantages to those who may succeed to the estate, as to themselves. It has therefore been long settled, that the restrictive part of these powers shall be construed strictly against the tenants for life, and in favour of the remainder-men and reversioner; because the conditions upon which powers of this kind are given, are inserted with a view to their interest: and the lessees under such leases standing only in the place of the tenants for life, and deriving their title merely under the power, if that be not strictly followed, the right of the remainder-men and reversioner to possess the estate, freed from the lease, will take place of the right of the lessees, as superior to it. From whence it follows, that every circumstance required by the power must be strictly followed, otherwise the lease will be void.

Fitzg. R. 219. Doe v. Cavan, 5 Term R. 567.

3. The instruments by which leasing powers are executed, are construed more strictly than other deeds of appointment. For it being expressly required that tenants for life should execute their powers of leasing in a particular manner, that becomes a condition precedent; and if all the circumstances required by the power are not strictly followed, the power is held to be totally unexecuted. So that if an improper covenant is inserted in a lease made under a power, the lease is thereby void in its crea-

infra, c. 16, 17.

Doe v. Sandham, infra.

Doe v. Watts, 7 Term R. 83. tion, and not the covenant only: and no acceptance of rent, or other act, by the person in remainder or reversion, will operate as a confirmation of it.

ante, c. 5. § 70.

Restrictions annexed to.

4. The restrictions which are usually annexed to leasing powers relate: 1st, To the instrument by which the power is to be executed. 2d, To the lands to be let. 3d, To the time when the lease is to commence. 4th, To its duration. 5th, To the rent directed to be reserved. 6th, To the clauses and covenants required to be inserted in such leases.

1° As to the Instrument.

5. With respect to the instrument by which a leasing power is directed to be executed, it is generally required to be by deed indented, sealed, and delivered in the presence of, and attested by, two or more credible witnesses. And it is also usually required, that

1 Burr. 125. the tenant should execute a counterpart of such indenture.

1 Vent. 291. 2 Lev. 149.

6. Livery of seisin is not necessary to be given on a lease of a freehold estate, made under a power: because a lease of this kind takes effect from the deed by which the power is created; and the legal estate is transferred to the lessee, by the operation of the statute of uses.

2° As to the Lands to be leased.

7. With respect to the lands to be leased, powers of this kind are generally restrained to those which have been usually let or demised to farmers; in order to prevent the tenant for life from leasing the mansion-house, park, gardens, pleasure grounds, or other parts of the land usually occupied by the proprietors of the estate, and deemed necessary to the dignity of the family.

8. This clause is taken from that which is inserted in the statute 32 Hen. VIII., by which tenants in tail are enabled to make leases, which has been

ante, c. 5. already stated. And the rules adopted by the

courts of law, in the cases which have arisen on that statute, apply equally to leases made in pursuance of powers.

9. Lands which have been demised three times are considered as lands usually let. So lands which have been demised twice: but lands which have been only once let, do not fall within the description of lands usually let; for, *usus fit ex iteratis actibus.* Vaugh. 33.

10. Lands not demised for the space of 21 years previous to the making of a lease under a power, are not considered as lands usually let.

11. A person was tenant for life, with power to make leases of all or any of the lands in an indenture of settlement particularly mentioned, which at any time theretofore had been usually letten or demised, for and during the term of 21 years; reserving the rents then usually paid, or more. The tenant for life made a lease of part of the premises contained in the settlement, which had been once let for 100*l.* a year for 21 years, but the term of 21 years had been long expired, and the premises had not been letten after. The question was, whether these lands came within the description of lands at any time theretofore usually demised. Tristram v. Baltinglass, Vaugh. 31.

Lord Ch. Just. Vaughan said, the words *usually demised*, might be taken in two senses; the one for the often farming, or repeated acts of leasing lands, to which sense this case did reasonably extend; the other for the common continuance of lands in lease, for that was actually demised, and so lands leased for 500 years long since were lands usually demised, that was, in lease, though they had not been more than once demised; and the former construction agreed both with the words and intention of the settlement. But what was not farmed at the time of this proviso's being made,

nor for 20 years before, could not be said to be at any time before commonly farmed; for those 20 years was a time before, in which it was not farmed. Besides, the proviso requiring a reservation of the rents thereupon reserved, at the time when the deed was made, necessarily implied that the land demisable by that proviso, must be land then under rent: for when no rent then was, the rent *then* thereupon reserved could not be reserved; but the premises in question had then no rent upon them, for they had not been let for 20 years before, nor then; and therefore were not demisable by that power.

Right v. Thomas, 3 Burr. 1441.

12. A covenant to stand seised is considered as evidence of the usual manner of demising; and the objection, that the covenant to stand seised in question was by way of provision for a younger child, was deemed to be of no weight; for that was every day's practice.

A Qualification destructive of a Power, dispensed with.

13. Where there appears an intention that the tenant for life shall have a power to lease all the lands, and a proviso is inserted that the ancient rents shall be reserved; this shall not confine the power to those lands which have been usually let, but it will be construed to extend to all the lands; and the restriction only applied to those lands which have been usually let. And Lord Holt has said, that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with it.

Carth. 429.

Cumberford's Case, 2 Roll Ab. 262.

14. A conveyance was made of divers manors, rents, and services, to the use of A. B. for life, with power to make leases of the same, or of any part or parcel thereof, so that such rent or more was reserved on every lease, as was reserved and paid for the same within two years then next before. Some part of

the premises consisted in woods, that had not been before leased at any rent, within the two preceding years. It was determined that the tenant for life might make leases of that part, reserving such rent as he pleased; because it appeared from the generality of the words, that it was intended he should have power to lease all the lands; and the restrictive clause was meant to apply only to such lands as had been demised for two years before.

15. An estate which consisted of lands and a rectory, was conveyed to the use of a person for life, with power to let the premises, or any part of them, so as a rent of five shillings was reserved for every acre of land. The tenant for life demised the rectory, which consisted of tithes only, reserving a rent; and the question was, whether the power warranted such a lease. It was argued that it did not, for a construction was to be made upon the whole clause, and the latter words, that required a reservation of rent, should explain the former, and restrain the general word *premises* to land only, or things out of which a rent might issue, which it could not out of tithes. But it was resolved by the Court, on the authority of Cumberford's case, that the lease of the rectory was good: for the power was general, and enabling; and the last clause being affirmative, though restrictive, would not restrain the generality of the former ones: therefore the power must be construed to be, to demise the premises that consisted of acres at 5*s.* an acre; but of what were not acres, no rent need be reserved: and it was said by Lord Hale, that if the power had been to let the manor and rectory, expressly reserving 5*s.* per acre, the lease had been good of the rectory, without any rent.

Walker v. Wakeman, 1 Vent. 294. 2 Lev. 150.

3 Keb. 597.

Winter v. Loveden, 1 Ld. Raym, 267. Com. R. 37. 12 Mod. 147.

16. A manor and other hereditaments were settled; with a power to the tenant for life to make leases, excepting the ancient demesne lands, and so as the ancient rent was reserved. It was determined that this power did not enable the tenant for life to demise the copyhold lands held of the manor; because they were part of the demesnes: but that the rents and services of the manor might be demised; notwithstanding that one qualification annexed to the exercise of the power was, that the ancient rent should be reserved; and no rent could be reserved on a lease of rents and services: for it appeared that part of the manor was intended to be comprised within the power, but as the demesne lands were not comprised, the rents and services must; for the whole manor consisted of demesnes, rents, and services: and if a man had a power reserved to him of making leases of two things, and a qualification was annexed to the power which could not extend to one of these things, he might make a lease of that thing, without any regard to the qualification.

Goodtitle v. Funucan, Doug. 565.

17. A tenant for life, with power to demise all the manors &c. and hereditaments, or any part thereof, reserving so much or as great yearly rents, or more, as was then paid; made a lease of a manor and fishery, which had never been let, together with other premises, reserving a greater rent than had formerly been reserved. It was contended that the manor and fishery were not demisable under the power, as no rent was then paid for them: to which it was answered, that the qualification in the power, with regard to the reservation of rent then paid, could only apply to such parts of the subject of the power as were then let; but the power itself expressly extended to the manors and fishery; and it must have been known at

the time of the settlement, that neither the manors nor fishery were then let; for where a general authority is given by a power to let manors, lands, &c., and afterwards there is a qualification that the usual rent shall be reserved, such affirmative qualification shall not restrain the generality of the power, but shall only apply to the part which was formerly demised. It was also objected, that as the rent was entire, and could not be apportioned, it was not clear that the ancient rent was reserved for that part of the premises which had formerly been let: in answer to which it was said to be sufficient that the advance on the whole was 30*l.*, and that the fishery was only worth 15*l.* a year; and the manor was not of any pecuniary value.

Lord Mansfield said, the power was express, to demise the manors and fisheries; they were particularly mentioned in the settlement, and the power went to the whole. They paid under this lease as great a yearly rent as at the time of the settlement, for they paid nothing then; the words therefore were complied with, and this objection could only stand upon intent; but the Court thought no such intent appeared. The manors were nominal, of no value, no object of yearly income, the fishery worth only 15*l.* a year: they were convenient to the lessee living on the land, and of no use to the remainder-man: the right of fishing and shooting was reserved to him. For his part, he thought the intent was to give leave to demise all, reserving as much rent in the whole, as had been paid before; and in fact 30*l.* more had been reserved. The Court was of opinion that the lease was good.

18. A power may however be taken to be special, and not allowed to extend to all the property comprised in the deed wherein the power is given, if it

appear from the nature of the power, compared with that of the property, to have been the intention of the parties that it should be special.

Baggot v. Oughton, 8 Mod. 249.

19. A power was given to a tenant for life, to make a lease or leases for three lives or 21 years, of all or any part of the premises in the indenture comprised, at such yearly rents, or more, as the same were then let at. Lady Baggot, who was the tenant for life, married Sir A. Oughton, and made a lease to him of the capital messuage for 21 years; but reserved no rent. It was resolved, that this lease was void; and the judgement is said to have been affirmed in the House of Lords.

Pomery v. Partington, 3 Term R. 665.

20. A person devised his estate in strict settlement, and gave to all the tenants for life, a power to grant, demise, and lease all or any of the said manors, parts of manors, messuages, lands, tenements, and hereditaments; so as the usual rents and other yearly payments, dues, reservations, and heriots, were from time to time reserved, and made due and payable. A tenant for life made a lease of certain tithes, which had never been leased before; and the question was, whether that lease was good.

Lord Kenyon said, when he first read over the case, he entertained no doubt upon the question; but when Cumberford's case was stated at the bar, he wished to see on what ground the Court proceeded in determining it. For if certain legal ideas were annexed to certain technical words, as in the case of limitations of real estates, it would be extremely dangerous to depart from the sense given to them by the law, however apparent the intention of the parties might be to the contrary. Now, on looking into that case, the rule would be found to be clear and undoubted; but the counsel who argued Goodtitle

ante, § 14.

v. Funucan, in stating Cumberford's case, omitted the most important words; namely, that the intention of the parties was to govern. If that was the rule, and the Judges, in construing the particular words of different powers, had appeared to make contrary decisions at different times, it was not that they had denied the general rule, but because some of them had erred in the application of the general rule to the particular case before them; for in all the cases they professed to determine upon the intention of the parties. It was not necessary to go into all the cases, because they were all arranged in Douglas, and the due effect given to them by Lord Mansfield; from all which he at last extracts the general rule, that the construction of these powers must be governed by the intention of the parties; and in applying that rule to the case of Baggot v. Oughton, he said—"In a family settlement of an estate, consisting of some ground always occupied together with the seat, and of lands let to tenants, upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excluded the mansion-house, and lands about it, never let. No man could intend to authorize a tenant for life to deprive the representative of the family of the use of the mansion-house. The words in such a case show, that the power is meant to extend only to what has been usually let; by that means the heir enjoys all the premises in the settlement, just as they were held by his ancestor, the tenant for life; he has the occupation of what was always occupied, and the rent of what was always let." ante.

Now, the whole of this reasoning applied most pointedly to the case before the Court; these tithes never had been let, but had always been occupied by

the possessor of the estate; therefore he did not think that the case of Baggot v. Oughton could be distinguished from this in principle. This was the broad ground on which he was of opinion, that the lease in question was not a valid one. The other Judges concurred; and Mr. Justice Buller observed, that in the case of Goodtitle v. Funucan, the Court relied on the words at the end of the power—" or proportionably for any part thereof," though no notice was taken of it in the printed report. For those words showed that it was the intention of the parties that the *quantum* of the rent, and not any particular part of the premises included in the settlement, was to guide the person in executing the power. But in this case the devisor did not intend that any part of the estate should be let, but that which had been usually demised before.

As to the Time when the Lease is to commence.

21. The third restriction usually inserted in powers of leasing, relates to the time when the lease is to commence; whether immediately, or at a future period; whether in possession, or in reversion.

Com. R. 39.

Lord Holt has explained what was the nature of a lease in reversion thus—" In the most ample sense, that is said to be a lease in reversion, which hath its commencement at a future day; and then it is opposed to a lease in possession; for every lease that is not a lease in possession, in this sense is said to be a lease in reversion." In a more confined sense of the term, a lease in reversion signifies a lease to begin from the determination of a lease in being; in which sense all leases, where there is a particular estate outstanding, are leases in reversion. And so is the term reversion to be taken, where mention is generally made of leases in reversion, under a power; for otherwise a tenant for life, with power to make

leases in reversion, might make a lease to commence fifty years after his death.

A general Power only authorizes Leases in Possession.

22. Where a power is given indefinitely to make leases, without mentioning the time when they are to commence, it shall be taken strictly against the donee of the power; consequently be construed so as only to authorize leases in possession, and not leases in reversion.

Suffolk v. Wroth, Cro. Eliz. 5. 6 Rep. 33 *a.*

23. Henry Earl of Suffolk was seised of an estate under an act of parliament, to the use of himself for life, remainder to his wife for life, &c.; with a proviso, that it should be lawful for the earl to make leases for 21 years. The earl made a lease for 21 years, and before the end of it, he made another lease to the lessee for 21 years, dated the 30th March, to commence at Michaelmas following. It was adjudged a void lease, because for the time it was a lease in reversion; and if he might make a lease to commence at the Michaelmas following, he might make it to commence twenty years after, which would destroy the effect of the settlement.

Doe v. Watton, Cowp. 189.

24. It was formerly held, that a lease made to commence from the date, or the day of the date thereof, was a lease in reversion: but this doctrine has been altered by the following determination.

Pugh v. D. of Leeds, Cowp. 714.

25. A tenant for life, with power to make leases for 21 years, in possession, and not in reversion, made a lease to his daughter, to hold from the day of the date of the indenture for 21 years. Lord Mansfield, after stating all the authorities on this subject, delivered his opinion that *from* might, in the vulgar sense, and even in strict propriety of language, mean either inclusive or exclusive: that the parties necessarily understood, and used it in that sense which made the deed effectual. That courts of justice were to con-

strue the words of parties so as to effectuate their deeds, and not to destroy them; more especially when the words themselves abstractedly might admit of either meaning. It was therefore adjudged, that the lease should be deemed a lease in possession, and therefore good, being warranted by the power.

Unless the Estate is reversionary.

26. Where lands are leased out for lives, or years, and are afterwards limited in strict settlement, with a power to the tenant for life to make leases generally, he may make a reversionary lease, to commence upon the determination of the subsisting lease; for otherwise the tenant for life might never have an opportunity of exercising his power.

Mar. of Northampton's Case, Dyer, 357.

27. Husband and wife made a lease of part of the wife's estate for 21 years, rendering the accustomed rent. Afterwards it was enacted by parliament, that the husband should have the lands in lease and the rent for his life, remainder to his wife; and that all leases and grants thereof made and to be made, by the husband by indenture for three lives or 21 years, reserving the accustomed rent, should be good. The husband, after eight years of the lease expired, (reciting the former lease,) demised the land for 21 years next after the end of the first 21 years, reserving the usual rent. It was held by Manwood and Dyer, that the lease was good; but Mounson was of a different opinion. And in a note it is said that Mounson's was the better opinion. But the validity of such a lease was established in the following modern case.

Fox v. Prickwood, Cro. Ja. 349.

Coventry v. Coventry, Com. R. 312.

28. A person being tenant for life of the reversion of lands, which were leased out for lives; with a power to make leases of any part thereof for 21 years; or one, two, or three lives; so as there were not in any part of the premises so leased, at any one

time, any more or greater estate or estates than for 21 years, or for three lives, or for any number of years determinable upon three lives; made several leases for 99 years, to commence from the death of a remaining life in a former lease. And upon an issue directed out of Chancery to try the validity of these leases, the Court of King's Bench was of opinion, that they were good under the power.

29. But where, in a settlement of an estate in reversion, a power is expressly given to make leases in possession; a lease in reversion will not be supported.

30. A father and son made a lease for 99 years, if three persons or any of them should so long live. Afterwards they settled the reversion to the use of the father for life, with a power to make leases for 99 years, or three lives in possession, or for two lives in possession and one in reversion, or for one life in possession and two in reversion. The father, during the continuance of the first lease, made a lease for life; and the question was, whether the latter lease, being made while the lives in the former lease were in being, was authorized by the power. Justice Keeling inclined, that the lease was within the power; for the settlement being only of the reversion, a present lease of the reversion was within it. Windham and Twisden held, that the settlement being of a reversion, if the words of the power had been general, to make leases, a lease in reversion had been within it; but the power being expressly to make leases in possession, this lease in reversion was not within it.

Opey v. Thomasins, T. Raym. 132.

31. A power to make leases generally, does not authorize the donee to make a lease to commence after the determination of a lease in being. For it

Does not authorize a Lease to commence after a subsisting Lease

has been observed, that such a lease is reversionary in the strictest sense.

Shecomb v. Hawkins, Yelv. 222. 1 Brownl. 148. Duke of Bucks v. Antrim, Sid. 101.

32. A woman, tenant in fee simple, levied a fine to the use of herself for life, remainder to her eldest son in tail; reserving to herself a power to make leases at any time for 21 years or three lives. She afterwards leased a part of the premises to A. for 21 years, and before that lease expired, made another to A. for 21 years, to begin after the determination of the former lease, and died. The first lease expired, and then a question arose, whether the latter lease was good under the power. It was adjudged, that it was not, for upon such power she could not make a lease to commence at a day to come, but was confined to a lease in possession, and could not convey an interest to commence *in futuro* in reversion, after another estate expired; but the law would adjudge upon a general power to make leases, without saying more, that they ought to be leases in possession; for if upon such power a lease might be made upon a lease, the donee might, by making infinite leases, detain those in remainder out of posssesion for ever, which would be contrary to the intent of the parties, and against reason.

33. It is immaterial whether a lease made to commence upon the determination of a lease in being, be made to the person who holds under the former lease, or to a stranger; it is equally reversionary.

Doe v. Cavan, 5 Term R. 567.

34. Lord Bath being tenant for life, with power to grant leases for any number of years, not exceeding 40 years, in possession and not in reversion, demised the premises in question to B. Timbrell for 60 years, which term became afterwards vested in Colonel Lambert. On the 30th of April, General Pulteney, who was then seised of the premises for life under the same settle-

ment, made a lease to Colonel Lambert for 34 years, to commence at the expiration of the former lease for 60 years. It was argued, that this was a reversionary lease, to take effect after the determination of another lease then in existence, and which had at that time 26 years to run. The circumstance of the second lease being granted to the same lessee, and to commence after the expiration of the former lease, could not vary the case, and operate so as to make it a continuance of the former lease; it must therefore be considered as a reversionary lease, as much as if it had been granted to a different lessee. The Court held the lease to be void.

35. George Allan being tenant for life, with a power to make leases in possession, and not in remainder or reversion or expectancy; by indenture of lease, bearing date and executed the 29th March 1798, demised the lands in question to Calvert, to hold the same in manner following, viz. the tillage ground from the 13th February then last past, the pasture ground from the 5th April then next, and the residue from the 12th of May also then next, for the term of 12 years, from the said respective days. The periods mentioned in the *habendum* of the lease were the usual periods of entry by tenants on arable, pasture, and meadow ground, in the country where the lands lay. Calvert, the lessee, on the day of the date of the lease, held the premises as tenant from year to year, and which tenancy, according to the custom of the country, would determine on the 13th February, the 5th of April, and 12th of May in the year 1798.—It was contended, that this was a lease in reversion, and not in possession, except as to the tillage ground; and the lease being entire, if void for part, must be void for the whole. The Court was of

Doe v. Calvert, 2 East, 376.

this opinion, and observed, that the cases cited where leases had been holden void for excess only, did not apply, for this was no question of excess: in those cases, by retrenching the excess, a lease might be brought within the terms of the power; but no limitation of the term would make a lease in reversion, a lease in possession.

But concurrent Leases are good.

36. Where a person has a general power to make leases, he may make a concurrent lease, to commence immediately; although the lands are then held under an existing lease, made either by a former proprietor, or by the person making such lease.

Berry v. Rich, cited Hard. 412.

37. It was adjudged by the Court of Common Pleas, about 17 Cha. II., that if a man had a power to make a lease for years, where there was another lease in being, there, if he made a lease to commence *in præsenti*, the power was well executed; and the second lease should continue as long as it might, taking effect in possession after the determination of the first lease.

Read v. Nash, 1 Leon. 147.

38. A person devised lands to his son for life, with a proviso, that if he made any alienation, &c. otherwise than a lease for 21 years, he should forfeit his estate. The son made a lease for 21 years, and a year before the expiration of that lease, he made another lease for 21 years, to begin immediately. The question was, whether the last lease was authorized by the power. It was said, that although the tenant for life could not, under the power, make leases in reversion, for then he might charge the inheritance *in infinitum*, yet such a lease as this was good, for it was to begin presently, so that the inheritance could not be charged in the whole for more than 21 years. And the Court seems to have been of that opinion; but no judgement appears to have been given.

39. A person was tenant for life, with power to demise the lands to any person or persons in possession, but not by way of reversion, or future interest, for the term of 21 years absolute, or any lesser absolute term, or for any term or number of years determinable upon one, two, or three lives. The lands were let for a year, and then the tenant for life, by indenture, reciting his power, demised them for 99 years if the lessee should so long live; and directions were given to the tenant for a year to pay his rent to the lessee, which he accordingly did. It was contended, that this was a lease in reversion, and therefore void under the power. But Lord Mansfield said, it was good as a concurrent lease, upon the authority of the case of Read v. Nash. Goodtitle v. Funucan, Doug. 565.

40. With respect to leases in reversion, it has been already stated, that a power to make leases in reversion, when applied to chattel interests, only extends to leases to commence from the determination of leases in being: and does not enable the donee of such a power to make leases to commence generally at any future period. And Lord Holt says, the expression to lease in reversion has a different signification, in the same conveyance, when applied to leases for lives in reversion, from that which it bears when applied to leases for years. For as a lease for lives cannot, strictly speaking, be made to commence *in futuro*, it will in that case be intended of a concurrent lease, or a lease of the reversion; that is, of the land which is then in lease, to commence in possession after the determination of the then existing lease; though it commences in interest presently, and is concurrent with the existing lease. And that if a power enabled any one to make leases in reversion, as well as in possession, he could not make a Of Powers to lease in Reversion. 1 Com. Rep. 39. ante, c. 4. § 21.

lease in possession, and another lease in reversion, of the same land; but his power to make leases in reversion should be confined to such parts of the land as were not then in possession.

41. It has been already stated, that a general power of leasing, only authorizes a lease in possession. But where a power expressly enables a person to make leases as well in possession as in reversion, a lease in reversion will then be good.

Whitlock's Case, 8 Rep. 69.

42. William Whitlock being tenant for life, with power to make leases as well in possession as in reversion, demised the premises for 99 years, to commence after the death or determination of the estate of the prior tenant for life; and this was held to be a good lease under the power.

4. As to the Duration of the Lease.

43. The fourth restriction usually inserted in powers of leasing, relates to the duration of the lease. The usual practice is, to restrain tenants for life from making leases for a longer term than 21 years; except in those countries where lands are usually let for lives. There the tenant for life is allowed to grant leases for one, two, or three lives.

Alsop v. Pine, 3 Keb. 44.

And where a power is given to make leases for three lives, it will be well executed by a lease for three lives, and the life of the longest liver of them; because that is the same thing.

8 Rep. 70 *b.*

44. A distinction is taken in Whitlock's case, between a power to make leases which in the beginning is general, absolute, affirmative, and indefinite; as to make a lease or leases, grant or grants, &c. without any restriction, and then a proviso of correction added, namely, that such lease or leases, grant or grants, &c. shall not exceed the number of three lives at most, or 21 years, which clause is negative, and qualifies the generality of the power:

and where the power is particular, entire and affirmative, to make leases for three lives, or 21 years. For in the first case, the donee of the power may make any lease or grant, provided it does not exceed the utmost extent of interest that the power warrants: as if a person has a power to make leases, provided they do not exceed the number of three lives or 21 years; there he may make a lease for 99 years, if three lives shall so long live, for that does not exceed the number of three lives, but in truth is less. But in the second case, he must pursue the power, which is particular and entire; as if a person has a power of making leases for three lives, or 21 years, he cannot make a lease for 99 years, if three lives shall so long live.

45. A person was tenant for life, with power to lease for one, two, or three lives, in possession; or in reversion for one, two, or three lives, or thirty years, or for any number of years determinable on one, two, or three lives. It was resolved, that he might make a lease in reversion for thirty years absolutely, by virtue of his power; because the limitations and restrictions were disjoined, and the latter part was carried on by way of enlargement of the power.

Winter v. Loveden, ante. 2 Salk. 537.

46. A power to let leases, provided they do not exceed 31 years, or three lives, will warrant a lease for three lives, or thirty-one years, whichever shall last longest.

47. Lord Netterville, being tenant for life, with power to lease for any term, not exceeding 31 years, or three lives, to commence in possession, made a lease for the lives of three persons, and the longest liver of them, or for the term, time, and space of 31 years, which should last longest. On a question, whether

Commons v. Marshall, 6 Bro. Parl. Ca. 168.

this lease was warranted by the power, it was determined by the Court of Exchequer, and also by the Court of Exchequer Chamber in Ireland, that the lease was good. On a writ of error to the House of Lords of England, the Judges were directed to deliver their opinion on the following question: "Whether the lease stated in the special verdict could be supported as a good execution of the power, or whether such lease was absolutely void." And they delivered their unanimous opinion, that the lease might be supported as a good execution of the power; whereupon the judgement was affirmed.

5. As to the Rent to be reserved.

48. The fifth restriction usually inserted in powers of leasing, relates to the rent directed to be reserved: in respect to which it is to be observed, that the rules adopted in cases of ecclesiastical leases, and of leases made by tenants in tail under the stat. 32 Hen. VIII., equally apply to leases made under powers.

ante, c. 5. § 37.

What is the ancient Rent.

49. The common practice formerly was, to require that the tenant for life should reserve the ancient, usual, and accustomed rent; in order that the persons in remainder might not be prejudiced by such leases: but doubts have arisen respecting the construction of these words. Lord Holt was of opinion, that the words, ancient and accustomed rent, meant that rent which was reserved when the power was created, if a lease were then in being; or that which was last before reserved, if no lease were in being. For he who created such a power, intended no more than that the tenant for life should not be able to put the estate in a worse condition than it was in when the power was created.

3 Cha. R. 66.

Idem.

50. Lord Cowper doubted as to this point, and suggested, that if lands were leased, once at a greater, and twice at a lesser rent, he should consider the

rent of the former lease to be the ancient rent. The last lease might be made by the person who had the fee, and who was not bound to reserve the ancient rent, but might let it for nothing if he pleased. He also said, this rule could not apply to lands anciently demised, where fines had been taken; for there the rents were more or less, as the fines were higher or lower.

51. Where lands have been usually leased for lives, and the usual profits made by fines, a tenant for life under a settlement, with a power to lease, reserving so much or more yearly rent as had been received for the premises within twenty years then last past, will not be obliged to let the lands at a rack rent, but may demise them, reserving the usual fines and rent; as a lease at a rack rent may be inconsistent with the nature of the estate. Right v. Thomas, 3 Burr. 1441.

52. Where a power required that two thirds of the improved value should be reserved as a rent, the reservation might formerly have been made in the terms of the power. But in general it now seems necessary that the precise sum intended to be reserved should be specified in the lease; for otherwise the persons in remainder may be put to infinite trouble and expence, in proving the value of the lands demised, or the *quantum* of the ancient accustomed rents. Clere's Case, 4th Point. 6 Rep. 17. Audley v. Audley, 2 Cha. R. 82.

53. In a settlement made on the marriage of Lord Brandon, eldest son of the Earl of Macclesfield, a power was given to the tenants for life to lease all the premises; so as upon every such lease, of such parts of the premises as had been anciently and accustomably demised, whereof fines had been usually taken, the old, usual, and accustomed yearly rent or rents, or more, should be yearly reserved and made Hamilton v. Mordaunt, 6 Bro. Parl. Ca. 145. Orby v. Mohun, 2 Vern. 531.

payable; and so as upon every lease of such part of the premises as had not been usually let, and for which there had not been any fine or fines usually taken, there should be reserved and made payable the most and best improved yearly rent that could be reasonably had or obtained for the same.

A tenant in possession under the settlement, being desirous to make leases for the benefit of his family, and seised with a sudden indisposition, when he had no rent rolls or old leases, made a lease of all the lands which had been usually letten, and fines taken for the same, yielding and paying *the several and respective old accustomed rents reserved and payable for the same.* And also another lease, whereby part of the premises, for which fines had not been usually taken, and of which there was then no lease for years, or for any life in being, were demised, yielding such sum and sums of money as should amount to the best and most improved yearly rent that could be reasonably had and obtained for the same.

A question having arisen on the validity of these leases, the latter of them was given up by the lessees; a reservation of the most improved rent being so uncertain, that it could not be supported. And as to the former, after a hearing before Lord Cowper, assisted by Lords Holt and Trevor, it was held not to be warranted by the power, contrary to the opinion of Lord Holt.

On an appeal to the House of Lords, it was said, on the part of the lessees, that the objections made at the hearing to the validity of the lease, were, first, that it ought to have mentioned the particular rent reserved; secondly, that the ancient and accustomed rent was thereby reserved, as well for lands not an-

ciently leased, as for those that were. As to the first objection, it was argued that the specifying a certain rent, in the reservation of a lease, was clearly not necessary, if the particular rent intended might be known by proper reference. *Id certum est quod certum reddi potest*, was an undoubted maxim both in law and reason. What those ancient rents were, was a matter of fact, capable of being known, and without difficulty, by those who had the writings of the estate. That the reservation was in the same terms with the power, and consequently was pursuant to it. That the plain meaning of the restriction in this power, was to secure the ancient rents to the remainder-man; if he had these, he had all that was intended him; and there could be no doubt but he would be entitled to them by this reservation. As to the other objection, it was argued that the demise in the words of it was several; that the reservation of the several and respective ancient rents, for the several and repective messuages, &c., could not mean any thing but such rent for each tenement as was anciently reserved for the same; and it would be difficult to use plainer and stronger words to import the meaning. That the words *yielding therefore* must be understood *reddendo singula singulis*: and which method of interpretation the law prescribes in many instances, not so strong as this. So that as to those parts of the estate demised, if there was any which had no ancient rent, no rent was reserved by this reservation; and consequently as to those the power was not executed.

On the other side it was insisted, that as to the lease upon which the rent reserved was mentioned to be *the most improved rent*, this reservation was plainly void, for the absolute uncertainty of it; consequently

that lease was not warranted by the power, and was accordingly given up at the hearing. And as to the other lease, *under the several and respective old and accustomed rents reserved and payable for the said premises;* this was also void, as against the remainder-man, and not warranted by the power; because there being many farms, and a great estate within this one lease, some let at the ancient rents, and some not, it would put insuperable difficulties upon the remainder-man, to recover his rent; he must be so lucky as to point out what was the old rent, for what and for how much land it was paid, and at what times payable; and if the tenant could prove that a different rent was paid for the land, or that any other land was comprised in the lease, or that the rent was formerly payable at any other day, the remainder-man could not recover; but instead of recovering the rent, must from time to time pay him costs: whereas it was intended that the remainder-man should have as plain, certain, and easy a remedy for his rent, as other landlords have. But upon the lease in question it neither appeared what the rent was which the remainder-man was to have, nor for what estate the rent was to be paid, nor when or on what days it was to grow due; the lease giving the remainder-man no manner of light as to those particulars. That as these powers were generally reserved in all settlements, if so loose an exercise of them should be allowed to the tenant for life, it would introduce the greatest difficulties, and put the greatest hardships upon the persons claiming in remainder under such settlements; and by such a construction the tenants for life, by an uncertain, general, and short lease of the whole estate, which might be a rash and sudden act, and done with very little expence of money, time,

or trouble, would be enabled to render the remainders, though settled on the highest considerations, of very little value; because the persons to whom such remainders belonged, would be in a great measure disabled from recovering any rent.

After hearing the opinion of the Judges upon a question proposed to them — "Whether the power in the settlement to make leases was well executed," the decree was affirmed.

54. Where lands have never been leased, and a power is given to demise them, reserving such rent as was reserved for them within the two preceding years, a lease may be made of them, reserving any rent that the lessor pleases. Cumberford's Case, ante, § 14.

55. Where a power was given to a tenant for life to make leases, with fine or without fine, rendering such rents and services as he should think fit; and he made a lease without rendering any rent; the lease was held good. Talbot v. Tipper, Skin. 427.

56. Where the power requires the ancient rent to be reserved, it must be made payable at the same time, and in the same manner, as the former rent. Therefore the reservation of rent half-yearly, where it was formerly reserved quarterly, will make the lease void; because it is *ad nocumentum* of the persons in remainder: it being more profitable for them to have it paid quarterly, than half-yearly; and all the beneficial qualities of the rent ought to be preserved. How to be reserved. Mountjoy's Case, 5 Rep. 3. 4th Resol.

57. The rent must also issue out of the same land. Therefore it was resolved in Mountjoy's case, that if two several farms, which had formerly been demised separately, were included in the same lease, reserving one rent, though equal to the two ancient rents; or if part of a farm was let, reserving a rent,

ante, c. 5. § 55.

pro rata; it would be void. And the stat. 39 & 40 Geo. III. c. 41. does not extend to this case.

58. An improvement in the estate will not be considered such an alteration as to vary the rent, by making it issue out of other hereditaments than those contained in the power.

Read v. Nash, 1 Leon. 147.

59. Thus, where a tenant for life, with power to make leases, reserving the ancient rent, having built a new house upon the land, made a lease, reserving the ancient rent; it was contended, that this could not be said to be the ancient rent, because part of it issued out of the new house; but the Court held the rent to be well reserved.

60. The rent must also be reserved in such a manner, that all the persons in remainder, claiming under the settlement by which the power was created, may be enabled to compel payment thereof.

What is the best Rent.

61. In modern times it has been usual to require that the best, and most improved rent be reserved.

Doe v. Lawton, 10 East, 278.

And it has been resolved, that in this case, the best rent means the best rack rent that can reasonably be required by a landlord, taking all the requisites of a good tenant, for the permanent benefit of the estate, into the account.

6. As to the Clauses and Covenants.

62. The sixth restriction usually inserted in powers of leasing, relates to the clauses and covenants directed to be inserted in such leases. And it is a general rule, that all those clauses, reservations, and covenants required by the power, must be inserted, otherwise the lease will be void against the remainder-men, and the reversioner.

Cardigan v. Montague, cited 1 Burr. 122.

63. The Duke of Montague was tenant for life, with power to lease, reserving the ancient usual and accustomed rents, heriots, boons, and services. In

the former leases the tenants covenanted to keep in repair; and that covenant was omitted.—Lord Hardwicke was of opinion that the covenant was a boon, and beneficial to the remainder-man, and held the leases void for want of it: he took some days to consider, and declared he was clear upon the argument, but took time because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man in as beneficial a manner as the ancient owners held it. Sugden on Powers, Appx.

64. The omission of a covenant for payment of rent will also vitiate a lease made under a power. For a mere reservation of rent does not make it payable till entry, and therefore it in fact may not be payable during the term; besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars. 1 Burr. 125.

65. The omission of a clause of re-entry will also invalidate a lease of this kind; for if such a clause be not inserted, the ground may be unoccupied, without a sufficient distress upon it; so that the remainder-man can neither have his rent, nor his land. Idem.

66. As the omission of a usual covenant will vacate a lease, so the introduction of an unusual covenant on the part of the lessor will have the same effect.

67. A person having a leasing power, reserving usual and reasonable covenants, demised a house, with a covenant, that in case the premises should be blown down, or burned, the lessor or his assigns, or the persons who for the time being should be entitled to the inheritance, should rebuild them, otherwise the rent should cease. The jury found, that this was an unusual and unheard of covenant, on the part of the lessor; and it was adjudged, that the lease was void. Doe v. Sandham, 1 Term R. 705.

68. If, however, the covenants in a lease made under a power, be upon the whole such as place the parties upon the same footing as under former leases; their differing in trifling circumstances, will not invalidate the lease.

ante, § 39.

69. In the case of Goodtitle v. Funucan, it was objected that the covenants were not so beneficial to the remainder-man, as those in the ancient leases; by one of which the tenant covenanted to pay half the land tax, and by the other, the lessor covenanted to free the tenant from tithes, and all church dues: whereas, in the former leases, the tenants covenanted to pay all duties and taxes, except the land tax. Church dues were by law particularly chargeable upon the occupier. The Court said, the power did not mention covenants; and that what was thrown on the landlord was compensated by what was paid by the tenant.

In what Conveyances Leasing Powers may be inserted. 1 Rep. 176. Poph. 81. Cro. Ja. 181. Jenk. 247.

70. It is laid down in Mildmay's case, that although a power of leasing may be reserved in a declaration of uses of a fine or recovery, yet that no such power can be reserved in a bargain and sale, or covenant to stand seised: for as uses may be raised on a fine or recovery, without any consideration, therefore a use will arise to the lessees, without consideration; and the former estates being raised without consideration, may be defeated without consideration. But as no uses can arise on a bargain and sale, or covenant to stand seised, without consideration, therefore no use can arise to the lessees; for where the persons are altogether uncertain, and the terms unknown, there can be no consideration; so that the former estates, which were raised upon consideration, cannot be defeated by such leases.

TITLE XXXII.

DEED.

CHAP. XVI.

Of the Execution of Powers.

1. *May be restrained by Circumstances.*
11. *Where the Instrument is specified, it must be adopted.*
13. *A Power given generally may be executed by Deed or Will.*
18. *But they must be properly executed.*
20. *Unless the Power is collateral.*
23. *A Will executing a Power retains all its Properties.*
26. *The Power need not be recited.*
30. *But the Instrument must refer to the Estate.*
34. *A Power may be executed by several Assurances.*
37. *And at different Times.*
41. *An Appointment may be a Revocation* pro tanto.
44. *Where a Power is exceeded, the Excess only is void.*
50. *An Appointment may give a lesser Estate.*
54. *Or direct a Sale, and appoint the Money.*
57. *Must not be illusory.*
64. *A Power cannot be delegated to another.*
67. *Unless there are special Words.*
69. *In what cases an Instrument operates as an Appointment.*
74. *Effects of the Execution of a Power.*
79. *Will not defeat a prior Estate.*

Section 1.

POWERS of revocation and appointment were formerly directed to be executed by the tender of a ring, the payment of a sum of money, &c.; but in modern times they have in general been directed to be executed by deed or instrument in writing, or by will. And the execution of these powers may be restrained by such collateral circumstances, and

May be restrained by Circumstances.

attended with such forms and ceremonies, as the persons creating such powers may think proper to require: nor can a court of law dispense with the performance of them, without violating the intention of the parties.

3 Cha. Ca. 55. 107.

2. This rule is the same, though the power be reserved to the original owner of the estate; for where a person debars himself from making any future disposition of his property, except by an act attended with certain forms, no court of law can dispense with the observance of them: for a person may feel conscious of such weakness, and frailty of mind, as to require that all future dispositions made by him, should be attended with such solemnities as may effectually prevent surprise and imposition. It has therefore been settled, ever since the introduction of powers, that all the forms and circumstances prescribed by the deed, by which the power is created, must be strictly observed; otherwise no revocation or appointment will take place.

10 Rep. 144*a*. Hob. 312.

Digges's Case, 1 Rep. 173.

3. Thus where the execution of a power of revocation and appointment was directed to be by deed indented, to be enrolled; it was resolved that these circumstances must be strictly complied with; for if the deed were allowed to operate as a revocation before enrolment, then it never would be enrolled. It was also resolved in the same case, that where the deed was directed to be enrolled in a particular court, it must be enrolled in that court.

Bath and Montague's Case, 3 Cha. Ca. 55. 2 Freem. 193.

4. The Duke of Albermarle made his will in 1675, and thereby gave a great part of his estate to the Earl of Bath. In 1681, he made a deed of settlement, whereby, though he varied in several particulars from his will, yet he limited the greater part of his estate to Lord Bath. In this settlement the duke

reserved to himself a power of revocation, by any deed or writing, to be executed by him in the presence of six or more credible witnesses, three whereof to be peers of the realm. In 1688, the duke made another will attested by three witnesses only, whereby he revoked this settlement, and gave a great part of his estate to Mr. Monk. Upon the duke's death, Mr. Monk brought a bill in Chancery, to set aside the settlement, and establish the will; and it was insisted on his behalf, that although the will might not, in strictness of law, be a revocation of the deed of settlement, the circumstances required not having been pursued, either in the number or quality of the witnesses; yet as it was made with great deliberation, (it being in proof that the draft was not completed till six months after instructions had been given for preparing it, and that Lord Ch. Justice Pollexfen's opinion was taken upon it,) it ought to be deemed an effectual revocation in equity, although the circumstances required had not been strictly pursued; as they were only prescribed to prevent surprise; and it was evident there was none in this case. But it was held by Lord Keeper Somers, the two Chief Justices, Holt and Treby, and Mr. Baron Powell, that the latter will was no revocation of the former settlement, either at law or in equity; for in all cases of revocations merely voluntary, all the circumstances required by the deed creating the power, must be strictly pursued; and there was no precedent of any case in equity, in which the Court had given any aid, where both parties were volunteers.

5. Husband and wife settled the wife's estate to the use of themselves for their lives, remainder to their first and other sons in tail male; with a power

Dormer v. Thurland, 2 P. Wms. 506.

to the husband "by his last will, or any writing purporting to be his last will, under his hand and seal, attested by three or more credible witnesses, (if he should die before his wife, without any issue between them then living,) to charge the premises with any sum or sums of money, not exceeding 2000*l.* to be paid to such persons as he should appoint." There was no issue of the marriage; and the husband, by his last will in writing under his hand, attested by three witnesses, but not sealed, reciting his power of charging the premises with 2000*l.*, disposed of the same among his relations. One of the questions in this case was, whether this will, not being sealed, was a good appointment under the power.

Lord King was of opinion that the will being duly, executed, was a good appointment; but directed, for the satisfaction of the parties, as it was a matter of law, that it should be referred to the Judges of the Court of King's Bench; and it was by them held, that the will was void as a charge, for want of being sealed.

The opinion of Lord King was founded on an idea that the words, under his hand and seal, referred only to the sentence immediately preceding; viz. or any writing purporting to be his last will; and not to the words, by his last will: so that the power might be executed either by a will duly attested according to the statute of frauds, which does not require a seal; or else by a writing purporting to be a will, under his hand and seal: but the Court of King's Bench was of opinion that the words, under hand and seal, referred to both the preceding sentences.

2 Vent. 350. 6. In the case of Sayle v. Freeland, which was prior to that of Dormer v. Thurland, the Court said, that equity would help in the execution of a power, in

a little circumstance, when the owner of the estate had fully declared his intention to execute the power. But in a subsequent case Sir Joseph Jekyll said, this was going too far, unless there were some equitable circumstances in the case; and was contrary to what was resolved in Bath and Montague's case. Lord Mansfield has also said, that where there is no meritorious consideration, the intention of the person who creates the power cannot properly be fulfilled, unless the form is strictly pursued; and this doctrine has been confirmed by the following modern case.

Fitzg. R. 220.

Cowp. R. 269.

Ross v. Ewer, 2 Atk. 156.

Spranger v. Bernard, 2 Bro. R. 585.

7. A husband, tenant for life, had a power of revocation, by any deed or instrument in writing, to be executed by him in the presence of, and attested by, three or more credible witnesses, and to be enrolled in one of his Majesty's courts of record at Westminster; by and with the consent and approbation in writing of nine persons, or the survivors or survivor of them, but not otherwise. One of the nine persons whose consent was necessary gave a power of attorney to the husband, authorizing him to consent to any revocation he should think proper to make, and to execute any deed or instrument necessary for that purpose. By a deed poll executed by the husband in his own character, and also as attorney to one of the trustees under the power, he revoked the uses; and this deed was enrolled. Seven years after, the husband, by an indenture, reciting the deed of revocation, and that it being executed by the husband as the attorney of one of the persons whose consent was necessary, upon that account doubts were entertained of its validity, as a revocation, revoked the uses, with the consent of all the parties required; but this deed was not enrolled, in the lifetime of the husband: the court resolved that the first deed was

Hawkins v. Kemp, 3 East, 410.

not a good revocation, because the consent of one of the persons, whose consent was necessary, was not sufficiently given, by the execution of the deed by the husband, as his attorney; for if such a mode of signifying a consent was held sufficient, it would be a total destruction of the check intended, by requiring the personal approbation of a third person: that the second deed was not sufficient, because it was not enrolled; and that the enrolment of the first deed could not be transferred to the second; for every thing required to be done, in the execution of such a power, ought to be strictly performed.

M'Queen v. Farquhar, 11 Ves. 467.

8. It was held by Lord Eldon, that a power of appointment by deed, to be signed and sealed in the presence of two or more witnesses, but not required to be attested by them, the attestation applying only to sealing and delivery, was sufficient; as it should be presumed that the signature was also in the presence of the witnesses.

Wright v. Wakeford, 17 Ves. 454.

In a subsequent case, where a power of sale was given, with the consent of certain persons, testified by a writing under their hands and seals, attested by two or more witnesses; the attestation extending only to the sealing and delivery of the deed; Lord Eldon held, that there should have been an attestation of the act of signing; and directed a case to the Court of Common Pleas, where it was agreed that the deed was not executed conformable to the power.

9. By the stat. 54 Geo. III. c. 168. it is enacted, "that every deed or other instrument, made with the intention to exercise any power, authority, or trust, or to signify the consent or direction of any person, whose consent or direction may be necessary to be so signified, shall (if duly signed and executed, and in other respects duly attested,) be of

the same validity and effect, and no other, at law and in equity, and proveable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses thereto, expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing; or any other form of attestation shall not exclude the proof, or the presumption of signature."

10. There are however, several cases where a court of equity will support a defective execution of a power; which will be stated in the next chapter.

Where the Instrument is specified it must be adopted.

11. Where the nature of the instrument by which a power is directed to be executed, is particularly specified, it must be adopted. Therefore a power to revoke by deed, cannot be executed by will.

Darlington v. Pulteney, Cowp. 260.

12. The Earl of Bath, and Lord Pulteney his eldest son, joined in suffering recoveries, and declared the uses thereof to such persons as Lord Bath and Lord Pulteney, by any deed or deeds sealed and delivered by them in the presence of two or more credible witnesses, should jointly appoint; and in case of the death of either of them, then as the survivor of them, by any deed or deeds, to be executed as aforesaid, should appoint. Lord Bath having survived his son, made his will, duly executed and sealed, and thereby devised a piece of ground comprised in one of the recoveries. The question was, whether this will should operate as an execution of the power. A case having been sent by the Court of Chancery to the Court of King's Bench on this point; Lord Mansfield said, the first requisite which the power prescribed was impossible to be performed by will, which was, that it should be by joint deed of Lord Bath and his son. It was true the survivor

had the same power; but then it was emphatically reserved to be executed by deed. Now the word deed, in the understanding of the law, had a technical signification, to which a will was in no respect applicable. If any words had been thrown in, such as writing, instrument, or other term of a general comprehensive meaning, it might have been fair to have taken advantage of it, in favour of the intention; but there being no general words, nor any meritorious consideration, it was impossible to say that a will was a deed, within the terms of this power.

Doe v. Cavan, 5 Term R. 567. 6 Bro. Parl. Ca. 175.

The Court of King's Bench certified, that the power was not duly executed by this will. This opinion was confirmed by a subsequent determination of that Court, and affirmed by the House of Lords.

A Power given generally may be executed by Deed or Will.

13. Although the Courts have never deviated from the principle, that all the circumstances required should be pursued, yet, in other respects, they have proceeded with sufficient liberality in supporting revocations and appointments. Thus, if a power be given generally, without any restriction as to the nature of the instrument by which it is to be executed; or if words of a general nature only, such as writing or instrument, be inserted; it may in such case be executed either by a deed, or by a will.

Kibbett v. Lee, Hob. 312.

14. A person covenanted to stand seised to the use of himself for life, remainder to his eldest son and the heirs of his body; reserving to himself a power, by writing under his hand and seal, and by him delivered in the presence of three credible witnesses, to revoke the uses. Afterwards the covenantor made his will in writing, under his hand and seal, delivered in the presence of four witnesses, and thereby devised the lands comprised in the deed of

covenant to his youngest son. It was resolved, that this will, being a writing signed, sealed, and delivered in the presence of three credible witnesses, was a good revocation and appointment.

15. In the preceding case, the power was directed to be executed by the donee thereof, being in perfect health and sound memory; and though the verdict did not find his being in perfect health and memory, yet it was held to be well enough; for that should be presumed, unless the contrary was proved.

16. A person devised lands to his wife for life, and then to be at her disposal, provided it was to any of his children, if living; if not, to any of his kindred that his wife should please. The wife married a second husband, and conveyed the premises, jointly with him, by lease and release, and fine, to a trustee and his heirs, to the use of the wife for life, remainder to her daughter by her first husband, and the heirs of her body, remainder to her son by her first husband, and his heirs. The Court was of opinion that the conveyance by lease and release was an effectual though an improper execution of the power. Tomlinson v. Dighton, 1 P. Wms. 149.

17. In a settlement a power was given to Elizabeth Fowke, by any writing under her hand and seal, attested by two or more credible witnesses, (notwithstanding her coverture) to revoke the uses, and by the same or any other deed to appoint new uses. Elizabeth Fowke made her last will in writing, under her hand and seal, and in the presence of three credible witnesses, and thereby, without taking notice of her power, devised the estates. Upon a case sent from the Court of Chancery of Ireland to the Court of Common Pleas there, it was certified that the will was a good execution of the power. And on an appeal to the House of Lords of England, the Roscommon v. Fowke, 6 Bro. Parl. Ca. 158.

Burnett v. Mann, 1 Ves. 157.

decree of the Court of Chancery of Ireland, in conformity to the opinion of the Court of Common Pleas, was affirmed, with the concurrence of the Judges.

But they must be properly executed.

18. Where a power is given generally to revoke uses, and appoint new ones; or where a power is given to be executed by deed or will without prescribing the manner in which they are to be executed; the instrument is intended, in law, to be such a one as is proper for the disposition of that which is the subject matter of the power. From which it follows that a deed, made in execution of a power, must be sealed; and a will executed according to the statute of frauds.

1 P. Wms. 741.

Wagstaff v. Wagstaff, 2 P. Wms. 258.

19. Lands were conveyed to trustees and their heirs, to the use of them and their heirs, in trust, after raising a sum of money, to convey them to J. S. and his heirs, or to such person or persons as he or they should appoint. J. S., by a will attested by two witnesses only, devised the lands. It was contended that this will should operate as an appointment. But Lord Macclesfield held, that it could not be deemed an appointment, because it was not executed according to the forms prescribed by the statute of frauds.

Duff v. Dalzell, 1 Bro. R. 147.

Unless the Power is collateral.

20. Where no interest passes from the person who executes a power directed to be executed by will, and he is merely to apportion that which another person has given; in such a case, as he is not the person who makes the charge, or affects the estate, it has been held that it is not necessary such a will should be executed according to the statute of frauds.

Jones v. Clough, 2 Ves. 365.

21. Thomas Clough being tenant for life under a marriage settlement, with remainder to his first and other sons in tail, and having two sons, John and Thomas, who were of age, they entered into articles reciting the settlement, and that there was no pro-

vision for younger children, and agreed that 300 *l.* should be raised for that purpose, immediately after the death of the father; and should be paid to the younger children in such manner and form as the father should by his last will, duly executed, direct and appoint. The father, by a will attested by two witnesses only, distributed this sum of 300 *l.* It was decreed by Sir John Strange, M. R., that this will, though not duly executed according to the statute of frauds, was still a good appointment; because it did not make the charge, but only distributed the money.

22. Where a power of appointment is given, to be executed by a will or writing attested only by two witnesses, in such a case a will attested by two witnesses only, operates as a good appointment; because it does not derive its effect from the statute of wills, but from the deed by which the power is created; and the disposition is not considered as testamentary in its origin.

Dey v. Thwaites, 3 Cha. Ca. 69. Fearne's Op. 432. Guy v. Dormer, infra.

23. Although a will made in execution of a power does not derive its effect from the statute of wills, but from the deed of uses by which the power is created; and a will made under these circumstances is, in fact, an appointment of a use, not a devise; yet it retains all the essential properties of a will. It is construed in the same manner as if it was a proper will; for otherwise there would be a strange confusion in the interpretation of testamentary dispositions; if some were to be construed as proper wills, and others as appointments.

A Will executing a Power retains all its Properties.

2 Ves. 212.

24. Thus a will made in execution of a power is revocable without the insertion of a power of revocation: whereas it has been stated, that if a person executes a power by deed, he cannot after revoke such deed, unless he has reserved to himself a new power of revocation.

Lawrence v. Wallis, 2 Bro. R. 319.

ante, c. 13. § 24.

Tit. 38. c. 8.

25. So the appointee under a will, made in execution of a power, must survive the appointor, otherwise the appointment will be void. And an appointment by will, under a power, operates as a common devise; for the appointee in fee simple, if heir at law, is in by descent, not by purchase.

1 Ves. 135. 2—612. Tit. 38. c. 8.

The Power need not be recited.

26. An instrument may operate as a revocation and appointment, without any recital or mention of the power. For if the act done be of such a nature that it can have no operation, unless by virtue of the power, the law will resort to the power, and thereby give validity to the instrument, upon the principle that *quando non valet quod ago, ut ago, valeat quantum valere potest.*

Hob. 160.

Clere's Case, 6 Rep. 17. Cro. Eliz. 877. Cro. Ja. 31.

27. Clement Harewood being seised of three acres of land held *in capite*, made a feoffment in fee of two of them, to the use of his wife for life; and afterwards made a feoffment of the third acre, to the use of such person or persons as he should by his last will in writing appoint. Clement Harewood afterwards devised the third acre, by his will in writing, to a stranger in fee. It was resolved, that as Clement Harewood had not a power of devising the third acre under the statute of wills, it being held *in capite*, his will should operate as an appointment under his power; for otherwise it would have no effect.

Scrope's Case, 10 Rep. 143.

28. N. Scrope reserved to himself a power of revocation by writing indented under his hand and seal, subscribed in the presence of three witnesses: afterwards, by indenture subscribed in the presence of three witnesses, he covenanted to stand seised of the same lands to other uses. It was resolved in the Court of Wards, by the two Chief Justices and the Chief Baron, that although there was no express declaration of any intention to revoke the former uses, yet that this

conveyance should enure, first, as a revocation of the former uses, and secondly, as a declaration of new uses; *quia non refert an quis intentionem suam declaret verbis, an rebus ipsis et factis.* And when Scrope limited new uses, he thereby signified his purpose to revoke the former ones.

29. W. Dormer conveyed his estate to trustees to certain uses, with a proviso, that if he should by any writing, executed in the presence of two or more witnesses, in express words, signify and declare his intention to revoke or make void that deed, the uses should cease. W. Dormer afterwards made his will in writing, signed and sealed in the presence of two witnesses, by which he gave and devised the lands to different persons, from those to whom they were limited by the deed. It was contended, that the phrase, *by express words*, excluded all implied revocations; but it was determined that the will operated as an execution of the power.

Guy v. Dormer, T. Raym. 295.

Gilmore v. Harris, Skin. 325. Deg v. Deg, 2 P. Wms. 414. 2 Bro. R. 303.

30. The instrument by which a power is executed, must however mention, or have some reference to the estate on which it is intended to operate; otherwise it will not be considered as a revocation or appointment. But it will be sufficient if the estate subjected to the power be referred to, in terms which include it with the other property of the appointor; although it be not particularized.

But the Instrument must refer to the Estate.

31. A person having a power to charge an estate with 2,000 *l.* after the death of his wife, and a term for years being created for that purpose, he made a will, beginning with these words, "I charge all my real estate." It was held by Lord Hardwicke, that if a man had power to charge an estate, it was not necessary in the execution of it that he should refer to the deed out of which the power arose; for in a court

Probert v. Morgan, 1 Atk. 441.

Exparte Caswall, 1 Atk. 559.

of equity it was enough that his intent appeared: and if in the execution he sufficiently described the estate which he had power to charge, it would be bound; especially where the person charging was a purchaser of the power: and he held the power to be well executed.

Standen v. Standen, 2 Ves. jun. 589.

32. A person devised his real estate to be sold, and gave the money arising from the sale, and the residue of his personal estate, in trust for his wife for life, and after her decease, as to one moiety, for such person or persons as she should by any deed or writing, or by will, with two or more witnesses, appoint. The real estate was not sold. The testator's widow received the rents and profits, and the produce of the personal estate for her life; and by her will, after disposing of some specific articles, which she described to have been her husband's, she gave the residue thus:—"All the rest, residue, and remainder of my estate and effects, of whatever nature or kind soever, and whether real or personal, and all my plate, china, linen, and other utensils which I shall be possessed of, interested in, or entitled to, at the time of my decease, subject to and after payment of all my just debts, funeral expences, and charges of proving my will, and specific legacies, I give to A. B. &c." This will was attested by three witnesses. The testatrix had no other real estate than that directed by her husband's will to be sold. One of the questions was, whether the residuary clause in this will was a good execution of the power of appointment.

Lord Loughborough.—It is material to consider what the interest was that she took under her husband's will, and what she has done. She was entitled for life to the income of all the residue of his real and personal estate, and a moiety was given to her absolute

disposal, by any deed or writing, or by her will, attested by two witnesses. She was not limited as to objects; and as to the mode, it was as ample a latitude as any one could have. It is a little hard to attempt to explain that it was not her estate: how could she have had it more than by the enjoyment during life, and the power of disposing to whatever person and in whatever manner she pleased, with the small addition of two witnesses? By her will she gives all her estate and effects. It is hard to say, that using that expression, she meant to distinguish, and not to include this, which was as absolutely her's, as any other part of her property. But the person who drew the will goes on with augmentative phrases, "of what nature or kind soever, and whether real or personal:" these words do not add much to the force of it, "which I shall be possessed of, interested in, or entitled to." It is admitted there would be no doubt if she had said, *of which I have power to dispose.* Those last words would not add much, after what she had said before. But take it according to the strict technical rule in Sir Edward Clere's case, that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition. The testatrix had no other real estate. I am bound to satisfy all these words: upon the technical rule, I can satisfy them no other way: I cannot avoid supposing, what every one must be convinced she meant, that she made no difference between what she had from her husband, and her other property.

On an appeal to the House of Lords, this decree was affirmed. 6 Bro. Parl. Ca. 193.

33. The cases where a power has been held to be executed, under the general words of a will, are either

where the words of the will cannot be satisfied without its operating as an appointment; or where there is some description of, or allusion to, the property which is the subject of the power. For if the doctrine be carried any farther, a person having a power could never make a will, without being held to execute the power.

Andrews v. Emmot, 2 Bro. R. 297.

Langham v. Nenny, 3 Ves. 467.

A Power may be executed by several Assurances.

34. Although a power of appointment be directed to be executed by any deed or writing, yet it may be executed by several acts and assurances; provided they have such a relation to each other that they may be considered as making together but one assurance.

Leicester's Case, 1 Vent. 278.

35. A person having a power to revoke by indenture, executed a deed whereby he covenanted to levy a fine to other uses; and afterwards levied a fine accordingly.—Lord Hale said, "Upon the close and nice putting of the case, this might seem to be no revocation, for it was clear that neither the deed nor the fine separately taken could revoke; but *quæ non valent singula, juncta prosunt.*" And it was determined, that the deed and fine taken together operated as a good revocation.

Herring v. Browne, 1 Vent. 368. 2 Show. 199. Carth. 22.

36. Sir James Williams made a voluntary settlement, to the use of himself for life, remainder to his brother in tail, reserving to himself a power of revocation, by deed indented under his hand and seal. Some time after, Sir J. Williams levied a fine, and by a deed made between him, his brother, and others, bearing date a month after the fine was levied, reciting the fine, it was declared, that at the time of levying the said fine, the agreement of all the parties was, that it should enure to the use of the said Sir J. Williams and his heirs. It was determined in the Exchequer Chamber, by six Judges against two, that this fine and declaration of uses were to be considered as

one and the same conveyance; and operated as an execution of the power.

37. Powers of revocation and appointment may be executed at different times, over different parts of the estates that are subject to the power. And at different Times.

38. C. Digges, in consideration of his marriage, covenanted to stand seised to the use of himself for life, remainder to the use of his son in tail, with a proviso, that it should be lawful for him to revoke any of the uses or estates, and to limit new uses. Digges revoked the uses of part of the lands, and afterwards revoked the uses of another part. It was resolved, that he might revoke part at one time, and part at another, and so of the residue, till he had revoked all. Digges's Case, 1 Rep. 173. Sir R. Lee's Case. 1 And. 67. S. P.

39. A power was given by will to a person, "from time to time, by deed or deeds, writing or writings, to limit or appoint to the use of any woman or women, for and in lieu of a jointure, all or any part of the land, &c." The devisee, on his marriage, appointed part of the premises to the use of his wife, pursuant to his power. Afterwards the devisee, by another deed, reciting that he had got an additional portion by his wife, in consideration thereof, and as an additional jointure, appointed another part of the premises to the use of his wife. The question was, whether the devisee had not completely exhausted his power by the first appointment, or whether he had still sufficient power to make the second appointment. It was unanimously resolved, that the power was not exhausted by the first appointment, and therefore that the second appointment was good. Zouch v. Woolston, 2 Burr. 1136. 1 Black. R. 281.

40. It is laid down by Lord Nottingham, that where a man has a power of appointing a fee, he may execute it at several times, and appoint an estate for 1 Vern. 85.

life at one time, and the fee at another. And in a modern case Lord Kenyon said—"A power may be executed at different times, if not fully executed at first; provided the party, in the whole execution, do not transgress the limits of the power, as in Zouch v. Woolston."

2 Term R. 725.

An Appointment may be a Revocation pro tanto.

41. An appointment may in some instances have a partial effect, and only operate as a revocation *pro tanto*. Upon this principle it has been held, that where a person, having a power of revocation and appointment, mortgages the lands, such a mortgage only operates as a revocation *pro tanto*, because in equity the mortgagor still continues owner of the estate; a mortgage being considered as a pledge only for the money borrowed.

Perkins v. Walker, 1 Vern. 97. Thorne v. Thorne, Id. 141. 182.

42. But where a mortgage is made by an execution of a power, and there is also a complete disposition of the equity of redemption, there the revocation will be complete.

Fitzgerald v. Fauconberg, Fitzg. 207. 6 Bro. Parl. Ca. 295.

43. A person who had a power of revocation and appointment, conveyed the estate to trustees and their heirs, upon trust out of the rents and profits, or by mortgage or sale, to raise so much money as should be sufficient to pay all the debts mentioned in a schedule thereunto annexed; and after payment thereof, to pay the overplus, and reconvey such part as should be unsold, to the grantor, or such other person as he should appoint. It was determined that this deed operated as a complete revocation of the uses, and not as a revocation *pro tanto*: and this decree was affirmed in the House of Lords.

Where a Power is exceeded, the Excess only is void. Parker v. Parker, infra.

44. Where a power is exceeded by an appointment, either by a disposition of a larger interest than is warranted by the power, or to persons not objects of the power; the excess only is void: and the courts

will support the execution, as far as the power warrants. Alexander v. Alexander, 2 Ves. 640.

45. A tenant for life on an estate on which were mines, with power to let leases in possession for 21 years, made a lease of the mines for 26 years; without reference to the power. This was held a good lease in equity for 21 years; and I conceive would now be held good at law. Campbell v. Leach, Amb. 740.

46. Lands were limited to Shute Adams for life, remainder to Frances Adams his wife for life, remainder to the use of such child or children of the said Shute Adams and Frances his wife, and for such estate and estates, as they should jointly, or as the survivor, in case of no joint appointment, should by deed or will direct or appoint; and for want of such direction or appointment, to the use of the first and every other son of the said Shute Adams and Frances his wife, severally and successively in tail. Frances Adams survived her husband, and by deed reciting her power, appointed the premises to the use of Mary Shute Adams, her eldest surviving daughter, for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder to Catherine Adams, the other daughter of Frances, for life, remainder to her sons and daughters in the same manner; remainder to the use of the right heirs of the said Frances for ever. Frances Adams died, leaving the said two daughters and one son. The case being referred by the Court of Chancery to the Court of King's Bench, that Court certified their opinion that though Frances Adams executed her power, which was confined to child or children, by limiting estates to her grandchildren, yet the same ought to prevail so far as her power extended, and Adams v. Adams, Cowp. 651.

Robinson v. Hardcastle, 2 Term R. 241.

that the limitation to her daughters was good; but that the disposition of the inheritance to the child or children of her daughters was void; therefore there was no appointment of the inheritance, and the son took an estate tail therein, subject to the estates for life of his sisters.

Brudenell v. Elwes, 1 East, 442.

47. A power of appointment was given to husband and wife, and the survivor of them, unto and among all the children of the marriage, for such estates as they should appoint; and in default of appointment, to the first and other sons of the marriage in tail male, remainder to the right heirs of the husband. The wife having survived, appointed the estate to a daughter for life, remainder to her eldest son for life, remainder to his first and other sons in tail male, remainder to her second son in the same manner, remainder to her daughter in fee. Both the sons died without issue. Lord Kenyon said, the wife had no power to appoint to the children of unborn children, but was confined to execute her power among the children. So far therefore as she appointed an estate for life to the daughter, with remainder for life to the eldest son, she did well; beyond that she exceeded her power, in appointing to the issue of the son; and therefore the excess was void. But it was equally clear that she did not intend that the subsequent limitation over to the daughter in fee should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take till their issue male were extinct. Those intermediate limitations therefore being void, the ultimate remainder dependent upon them must also fall. If then the appointment were originally bad for the excess, the subsequent circumstance of the death of the brothers without

having had issue, could not make it good: the appointment must have been legal at the time of its creation. Therefore the estate must go as in default of appointment.

48. A condition annexed to an appointment, where the power does not warrant such condition, will be deemed void. So that if a father, having a power to appoint a sum of money among his children, qualifies his appointment to one of them with a condition, that he shall release a debt, or pay a sum of money, the appointment will be absolute, and the condition void. 2 Ves. 644. Pawlett v. Pawlett, 1 Wils. R. 224.

49. The principle upon which this doctrine is founded, is, that where there is a complete execution of a power, and something *ex abundanti* is added which is not warranted by the power; there, if the excess be distinguishable, so that the Court can draw a line, the execution will be good, and the excess only will be void. But if the boundary between the execution and the excess cannot be ascertained, the execution will then be void for the whole.

50. An appointment in execution of a power will be good, though it limits a lesser estate than that which the appointor was capable of creating. An Appointment may give a lesser Estate.

51. J. S. having four children, two sons and two daughters, settled his estate to the use of himself for life, remainder to his wife for life, and after their decease, to the use of such child and children, and in such shares and proportions, as he should appoint. J. S. by his will devised a rent charge out of those lands to his youngest son for life, remainder to the first and other sons of his body, and if he died without issue, so as the estate should come to his eldest son, then to pay 500*l.* a piece to his daughters. The eldest son insisted that the power was not well pur- Thwaytes v. Dye, 2 Vern. 80.

sued, as the testator might have distributed the lands among his children, but had no power to devise a rent charge, or sums of money. But the Court held the appointment good.

Roberts v. Dixall, 2 Ab. Eq. 668.

52. Husband and wife levied a fine of the wife's estate; and the uses declared were, that the husband and wife, or the survivor, should have a power to appoint and divide the estate among their younger children, in such proportions as they or the survivor should think proper. The husband survived, and by his will gave his daughter, who was the only younger child, 3,000 *l.* charged upon his wife's estate, intending thereby to execute his power. One of the questions was, whether this was a good execution of his power. It was urged that this was a naked power, and ought to be executed in the very terms of it; and was compared to a condition, which must be strictly performed. But it was resolved by Lord Hardwicke that the power was in substance well executed. It was true the direct terms of the power were not pursued, but the intent and design of it were. It was admitted that the husband might have appointed part of the estate to be sold, and the money raised by such sale; and what was done was exactly the same thing. The Court might order a sale. It was the same to the heir or remainder-man which way the child was to be provided for, only that giving a portion of the estate itself, might be a means to tear it to pieces; whereas the estate would be kept entire; and it was better for the daughter, and perhaps thought so by the testator, that she should have a sum of money than a small estate; and though the will might not enure as a good execution of the power, in strictness; yet within the meaning and design of

it, was a good charge for the young lady's benefit; and the case of Thwaites v. Dye was a very strong one to that purpose. ante, § 51.

53. A tenant for life having a power to limit the lands to any woman whom he should marry, for her life, by way of jointure; made a lease for 99 years, determinable on the death of his wife, by way of a jointure for her. It was held by the Court of King's Bench, on a special verdict, that this was not a good execution of the power at law; for the estates were totally different, one being a freehold, and the other a chattel. But Lord Mansfield said the widow brought her bill in Chancery, and Lord Talbot, arguing from the same premises, the power and the lease, without any other circumstance, held the lease to be warranted by the power: he said it was not a defective but a blundering execution; and he decreed the defendant to pay all the costs, both at law and in equity. Rattle v. Popham, 2 Stra. 992. 2 Burr, 1147.

54. A power of charging an estate with portions for younger children; or of appointing an estate among them; has been held to be well executed by a will, directing a sale, and appointing the money. Or direct a Sale, and appoint the Money.

55. In a marriage settlement there was a covenant by the intended husband, to purchase and convey an estate in strict settlement, with a power to the husband, tenant for life, in case there should be any younger child or children, to charge such sum or sums of money for such younger children, as he should appoint. The husband declared by his will that a particular farm should be sold after his wife's death, and the money disposed of among his younger children. The Court said, that this appointment being in substance exactly what the husband had a right to do, was good. Long v. Long, 5 Ves. Jun. 445.

Kenworthy v. Bate, 6 Ves. Jun. 793.

56. In a settlement there was a power given to the husband, of appointing the lands to the children. The husband by his will, reciting the settlement, and the power therein contained, devised the estates so settled to trustees, to sell and dispose thereof, and to divide the produce among his children. The Master of the Rolls (Sir W. Grant) held this a good execution of the power.

Must not be illusory.

57. Where a person has a power of appointing an estate, or a sum of money, *unto and among* his children, or any other class of persons, in such shares and proportions as he shall think proper: the appointor must give the whole among the children, or class; and each of them must have such a fair and reasonable share as is not illusory.

Menzey v. Walker, cases *temp.* Talbot, 72.

58. The trust of a term of 300 years, was declared to be for raising such sums of money, for the portions of the children of a marriage, (except an eldest or only son,) in such manner, and at such time, and under such limitations, as the husband should by deed or will appoint; so as such sum or sums did not, in the whole, exceed 2,000*l.* There were three younger children; and the husband by his will, reciting that his two daughters were amply provided for by their grandmother, appointed the whole of the money to his second son. It was decreed, that the execution of the power was void.

Pocklington v. Bayne, 1 Bro. R. 450.

59. Lands were limited to S. P. for life, remainder to his wife for life, remainder to the use of all and every the child and children of the said S. P., in such parts, shares, and proportions, and for such estate and estates, not exceeding an estate or estates tail, with or without power of revocation, and by, with, and under such powers, provisoes, remainders, or limitations over, to some or one of the said children;

as the said S. P. should by any deed or writing, or by will, direct or appoint: and for default of such appointment, then to all and every the children, to be divided share and share alike. S. P. by will, reciting the power, did in pursuance thereof limit one acre of the premises to his eldest son, and his daughter for their lives, and the life of the survivor of them, with remainder to such person or persons as should be entitled to the residue of the said premises; and then limited the residue to his second son Henry, in strict settlement. Lord Thurlow was clearly of opinion, that the execution of the power was totally illusory, and contrary to its nature; that therefore the estate must go among all the children, agreeable to the direction, in default of execution of the power.

60. If however, it appears, from the words of the power, to have been the intention of the parties, that the appointor should be enabled to appoint the whole of the property to any one of the persons intended to be benefited, an appointment to one will be good.

Thomas v. Thomas, 2 Vern. 513.

61. The trust of a term was declared, that if Robert Austin should die, leaving issue by his wife, a son and other children, then to raise a sum not exceeding 1,500*l.* for the sole benefit and advantage of such child or children, (other than an eldest), in such proportions, manner, and form, in all respects, as the said R. A. should for such purpose, by his last will in writing, direct, limit, or appoint; and in default of such direction, then to the sole benefit of such child, if but one; and if more (other than an eldest), to them all equally. R. A., by his will, directed the money to be raised, and appointed 450*l.* to one of the younger sons, and 1,050*l.* to a daugh-

Austin v. Austin, 2 Ab. Eq. 667.

ter; but gave nothing to another younger son; who brought his bill to be let in to a share of the 1,500*l.* It appearing, however, that he was otherwise provided for, and because there was a discretionary power in the father, which he had exercised in a reasonable manner; the bill, after long consideration, was dismissed.

Swift v. Gregson, 1 Term R. 432.

62. Lands were limited in a marriage settlement, to the use of John Gregson for life, remainder to and for the use and behoof of such child and children of the said J. G., and for such estate and estates, intents and purposes, as the said J. G. should appoint; and for want of such appointment, to the use of all and every the child and children of the said J. G. equally. J. G. by deed, reciting the settlement, and that he had two children, a son and a daughter, appointed that the premises should after his decease go to the use of the son, and the heirs of his body, remainder to the daughter and her heirs. The daughter brought an ejectment for the recovery of an undivided moiety of the estate, upon the ground that the appointment was illusory and void.

Mr. Justice Buller said, the words of the power were "to and for the use and behoof of such child and children, and for such estate and estates, &c." The argument for the plaintiff was, first, that where there is a power to give an estate to and amongst all and every the children, each must have a beneficial part; and secondly, that these words were tantamount to those. His objection was to the minor proposition. These words were not like those assumed: there were no such words in this power as, *to and amongst*, but just the reverse, for it was a power to appoint to the use and behoof of such child *and* children; therefore, instead of including all, it says, that the appointor

may appoint to one only. The plaintiff's counsel had admitted that under a power of appointing to *such of the children*, &c. an appointment to one only would be good; but the present words were stronger: an appointment to one, under a power of appointing to such child or children, was good, because it includes one. He cited the case of Spring v. Biles, Mich. 24 Geo. III. B. R., where a power was given to dispose of lands "to and amongst such of my relations as shall be living at the time of my decease; in such parts, shares, and proportions, as my wife shall think proper." And it was determined, that an appointment of the whole estate to one of the relations, was good. He observed that that case, with the difference only of *relations*, instead of children, was stronger than the present. There the power was—"To and amongst such of my relations, &c. in such parts, shares, and proportions, &c.;" which imported that a division was intended: but in the present case, the words, "parts, shares, and proportions," were not used, and there was no evidence of an intention that it should be divided into shares. In that case, the Court said, they had not a particle of doubt but that the word *such* meant one or more. Here, therefore, it must have the same construction. It must mean that the appointor should appoint to one or more. Judgement was given for the defendant.

Kenworthy v. Bate, 6 Ves. Jun. 793.

63. It has been determined in some modern cases, respecting personal property, that an illusory appointment may be accounted for by circumstances. And therefore, where a person, having a power of appointment among his children, and having advanced one of his daughters in marriage, recited that

1 Ves. Jun. 299. 2 — 336.

as a reason for giving her a small share; the appointment was held not to be illusory.

4 Ves. Jun. 785. 5 — 859. Bax v. Whitbread, 1 Ves. 15. Butcher v. Butcher, 1 Ves. & Beam. 79.

In a subsequent case, it was said, that in equity, an appointment of a very small share was not illusory, if justified by circumstances; as where that object was otherwise provided for. And Lord Eldon has observed, that the question whether an appointment is, or is not illusory, must be determined upon the circumstances of each case, according to a sound discretion; the power, however large the terms, being in some decree coupled with a trust: but an equal distribution is not required, nor any reason for the inequality, unless a share is clearly unsubstantial.

A Power cannot be delegated to another. 9 Rep. 76 *a*.

64. A power of revocation and appointment cannot be delegated to another; whether the power relates to the land, or is only collateral to it: for it is a maxim of law, that *delegatus non potest delegare*.

Ingram v. Ingram, 2 Atk. 88.

65. A husband, by his marriage articles and settlement, had a power of disposing by deed or will of a reversionary interest, to the issue of the marriage, in such proportions as he should think fit; the husband by his will, reciting the power, delegated it to his wife, that she might dispose of the estate among the children in such proportions as she should think proper. Lord Hardwicke said, this must be considered as a power of attorney, which could only be executed by the husband, to whom it was confined; and was not in its nature transmissible to a third person.

66. This doctrine is however confined to that part of the execution of a power in which the confidence and discretion is exercised; and does not extend to mere formal acts. In the case of the Attorney

General v. Scott, 1 Ves. 413, where a power was vested in trustees to elect a minister, Lord Hardwicke declared, that if the trustees had met, and agreed upon the person, they might make proxies to sign the presentation; for where a trustee had a legal estate vested in him, he might make an attorney to do legal acts. And it has been held in practice, that where an estate is vested in trustees, upon trust to sell, with the usual proviso that their receipts shall be a sufficient discharge to the purchasers; if the trustees themselves sell the estate, they may afterwards delegate the performing all such formal acts as may be necessary for completing the sale, and among others, that of signing the receipts, in their names, to others.

67. If a power be expressly given, to be executed by the donee or his assigns; an execution of it by an assignee will in such case be good; and a devisee will be considered as an assignee, within the words of the power.

Unless there are special Words.

Englefield's Case, infra, c. 18.

68. A fine was levied of certain lands, to the use of T. for life, remainder to I. his son, and the heirs male of his body, remainder to I. his executors and assigns for 80 years, and that he, and his assigns of the said term, should have full power and authority to demise, &c. for 21 years or three lives, rendering the ancient rent. I. the son devised this term, and died without issue male: the devisee entered, made his executors, and died. The executors assigned over the term, with power to make leases: and the question was, whether the power annexed to the term for 80 years, was transferrable, with the term, to assignees in law. The court was of opinion that the power was well transferred, and had been good if reserved to a stranger; but here it was annexed to an interest, and

How v. Whitfield, 1 Vent. 338, 2 Show. 57. 1 Freem. 476. W. Jones, 110.

not merely collateral, and the assignees might execute it. The Court also conceived that assignees included assignees in law, as well as in fact: but that the tenant in tail having devised the term, the devisee was an assignee, and the power in the greatest strictness of acceptation was *in fieri*, and consequently must go to his executors, and by the same reason to their assignees.

In what Cases an Instrument operates as an Appointment.

6 Rep. 18 *a.* Cro. Eliz. 877. Cro. Ja. 31. 1 Inst. 111 *b.*

69. An instrument may in some cases take effect, either as an appointment of a use, or as a common law conveyance; where the person who conveys has a power of appointment, with an estate in fee in default of appointment. Thus in Sir Ed. Clere's case it was resolved, that where a feoffment was made to the use of such person and persons as the feoffor should appoint, and until appointment, to the use of himself and his heirs; if in such a case the feoffor devised the land by will (having a power to devise it) as owner, without any reference to his power, it would pass as a devise, by the will, and not as appointed under the power: for the testator had an estate devisable in him, and also a power to limit a use; and he had his election to pursue whichever of them he chose: so that when he devised the land itself, without any reference to his power, he shewed his intention to pass the estate by his will, as owner of the land; and not to limit a use under his power.

Hob. 160.

70. In a subsequent case Lord Hobart said, that where an interest and an authority meet, if the party declare clearly his will to be, that this act shall take effect by his authority or power, there it shall prevail against the interest: for *modus et conventio vincunt legem*. And therefore in Sir E. Clere's case, it was agreed, that if the devisor had recited his power, and had relied upon that, all would have passed by ex-

press declaration of the party himself: nay more, though the party do not make an express declaration, yet if this act do import a necessity to work by his power, or else to be wholly void, the benignity of the law will give way, to effect the meaning of the party.

71. This last proposition is founded on the determination in Sir E. Clere's case: in which it appeared, that C. H. being seised of three acres of land, held *in capite*, made a feoffment in fee of two of them, to the use of his wife for life; afterwards made a feoffment of the third acre, to the use of such person and persons, and for such estate and estates, as he should limit and appoint by his last will; afterwards by his will he devised the said acre to A. B. in fee. It was determined, that as C. H. could not, as owner of the land, devise any part of the residue by his will, therefore the will operated as an appointment under the power; for otherwise it could have no effect. 6 Rep. 17 *b.* Cross v. Hudson, infra, c. 18.

72. By the settlement made on the marriage of Thomas and Elizabeth Cox in 1777, a power of revoking the uses of the settlement, with the consent of the trustees, was given to Cox and his wife; so as before such revocation, they should convey and assure other lands of equal or better value, in lieu thereof, to the same uses. By indentures of lease and release, dated in 1784, a capital messuage and other premises were conveyed to a trustee and his heirs, to hold to him and his heirs, to the use of such person or persons, and for such estate or estates, interest or interests, and with, under, and subject to such powers, provisoes, and agreements, as Thomas Cox should by deed or writing under his hand and seal limit and appoint; and in default thereof, to the use of the said Thomas Cox, his heirs and assigns. In 1792, Cox v. Chamberlain, 4 Ves. Jun. 631.

Thomas Cox entered into a contract to sell the estates comprised in the settlement of 1777; and by indentures of lease and release dated in 1792, Thomas Cox, in pursuance of all powers in him vested, did, with the consent of the surviving trustees in the marriage settlement, grant, bargain, sell, alien, release, and confirm, limit, declare, and appoint; and the said Thomas Cox and his wife did, with the like consent and approbation, convey and assure to the said surviving trustees, their heirs and assigns, the said capital messuage comprised in the indentures of 1784; to hold to them, their heirs and assigns, to and for the same uses, trusts, intents, and purposes, as were declared in the settlement of 1777. Thomas Cox and his wife revoked the settlement. Some doubts having arisen upon the title, with respect to the value of the substituted estates, and also upon the supposition that the indenture of August 1792 was intended to operate as an execution of the power, and therefore it was doubtful whether the legal estate did not vest in the trustees, in which case the uses declared thereon would be void at law, and good only as trusts in equity, the purchaser declined to complete his contract: upon which a bill was filed against him for a specific performance, and the usual order was obtained, referring it to the Master to inquire whether a good title could be made. The Master reported, that the substituted estates were of greater value than the estates comprised in the marriage settlement; and that the plaintiff could make a good title to the estates comprised in the agreement. Exceptions were taken to this report, and in support of them it was observed, that Thomas Cox, in the release of 1792, used words applying to the conveyance of an estate in fee simple, and also to the execution of a power of appointment:

Tit. 12. c. 1. § 9. infra, § 76.

such a union was very unapt and improper; but the instrument, though inaccurate, amounted to a complete execution of the power: then the other words, importing the conveyance of an interest, were completely inoperative. Considering it then as the execution of a power, the necessary effect of it was, to vest the legal estate in trustees; and then the objection arose, the estates of the persons beneficially interested being merely equitable, in which respect there was a material deviation from the settlement, which vested the legal estate in the persons beneficially interested. In answer to this objection it was said, that the only question was, whether the deeds of 1792 operated as a conveyance by lease and release, or as the execution of a power? The whole objection rested upon this, that it must operate as the latter: but where a man has an interest, and also a power, and does an act which may be either a conveyance of the interest, or the execution of a power, it shall be referred to his interest, and not to his power. Sir E. Clere's case was an authority expressly to that point. This was a conveyance to the uses of the marriage settlement, and that conveyed the legal estate to the *cestui que use*. The instrument was certainly more proper for the conveyance of an interest, than for the execution of a power. The words of appointment were thrown in generally by the conveyancer, and were quite superfluous: the party had no intention of executing the power. The Court always makes the deed operate according to the intention, if by law it may. The intention was declared to be, to vest the estate in trustees, to the uses of the marriage settlement: there was no room therefore for the presumption that the intention was merely to execute the power, not to convey an interest; that presumption was in oppo-

ante, § 71.

sition to the deed, which went to declare that the estate vested in them, and was to enure to the uses of the settlement: it did not begin with words of appointment, but with those importing conveyance. The order in which the words appeared, concurred with the form of the instrument, to show that the first words in order were intended to be the operative words: he threw in the words of appointment, if necessary, meaning to make use of all the powers that were in him. The deed did not recite the power particularly, but was in pursuance of all powers. But if the legal estate was vested in trustees, yet the proviso in the settlement was substantially complied with; for the estates were in equity in the persons entitled under the settlement, and they could come into Chancery for the legal estate whenever they thought fit.

Sir R. P. Arden, M. R.—The plaintiff having entered into this contract, has conveyed the substituted estates by the deeds of 1792, in pursuance of all powers in him vested, and containing words both of conveyance and of appointment. This was preparatory to the revocation of the uses of the settlement, and to enable the plaintiff and his wife to revoke them under the power. The question is, whether, under this deed, there is a good execution of the condition in the proviso; or in other words, whether by the deeds the plaintiff had legally conveyed to the trustees in the settlement this other estate; exactly in the same manner, and to the same uses, as the estate comprised in the settlement. The objection is entirely technical, and certainly very nice, and I think a little too refined; though an objection of that sort certainly may be fairly made; and I will not find fault with a purchaser for taking the opinion of the

Court upon it, if gentlemen of great character really state it as a fair ground of objection. The objection arises from the mode in which the estate substituted was conveyed to the plaintiff, which was to the use of such person or persons, and for such estate or estates, interest or interests, and with, under, and subject to such powers, provisoes, and agreements, as he should, by deed or writing under his hand and seal, limit, declare, or appoint; and in default thereof, to the use of him, his heirs and assigns. This therefore was vested in him at the time of the substitution; and the mode which he takes for that purpose is, not by expressly declaring that in pursuance of the power he appoints, but by this conveyance of lease and release; in which he uses words that cannot at all apply to the power; and as he had both a power and an interest, it is now said, to invalidate the deed, the Court must say he did this in execution of his power only, and not to convey his interest; that it must be referred only to the power, though the trustees are in possession by virtue of the lease, which was perfectly nugatory if he meant only to execute his power. That is going out of the way, to raise objections which the Court is in the habit of very much discouraging. I will not determine whether it would not have been a fatal objection, if it had been an execution of the power, vesting a trust estate, instead of the legal estate under the settlement; unquestionably it would be so at law.

I am clearly of opinion, upon every principle upon which the Court acts with regard to the construction of conveyances, that it would be monstrous in this case to hold that where there is a power, and an interest, and the act being equivocal, it is doubtful whether he acted under the one or the other, the

Court should adopt that which would defeat the instrument. But this case goes farther, for the act is not equivocal; the party has made use of words that have no reference to the execution of a power. I am of opinion therefore that this is an exceedingly good title.

Vide 7 Ves. 582.
10 Ves. 257.
Roach v. Wadham, 6 East, 289.

73. It is now the usual practice, where a person has a power and an interest, for him to make an appointment in pursuance of his power, and in the same deed, by a new witnessing part, to convey the lands by lease and release..

Effects of the Execution of a Power.

74. With respect to the effects attending the execution of a power, it has been stated, that where a power is executed, the former uses and estates cease, and a new use springs up to the appointee, which is derived from the seisin of the releasees or trustees, to which the statute immediately transfers the possession, and by that means the appointee acquires the legal estate, without entry or claim.

Tit. 11. c. 4. § 7.
10 Ves. 255.

1 Inst. 379. *b.* *n.* 1.
2 Atk. 565.

75. Although estates arising from the execution of powers owe their commencement to the deed of appointment; yet the appointee under the power does not derive his title from the appointor, or out of the estate whereof the appointor is seised, but comes in directly under the conveyance by which the power was created; and the uses created by the appointment being, in order, prior to the uses limited by the original conveyance, which only take place in the meantime, and until the appointment is made, such new uses precede them; and the appointment operates by relation from the time when the original conveyance was executed, just as if the estate created by the appointment had been actually limited in such original conveyance.

2 Ves. 78.
Venables v. Morris, infra, c. 22.

76. An appointment in pursuance of a power operates under the statute of uses, not as a convey-

ance of the land, but as a substitution of a new use, in the place of a former one: from which it follows, that if an appointment be made under a power to A. and his heirs, to the use of B. and his heirs; it is a limitation of a use upon a use; consequently B. only takes a trust estate. It is therefore now the practice, where an appointment is made to particular uses, to appoint the lands, not to trustees, to the uses intended, as in the case of a release, but to the particular uses intended.

77. Where a person settles his estate to the use of himself for life, remainder over, reserving to himself a power of revocation, and executes his power, he becomes immediately seised of his former estate, without any entry or claim: because, as he is already in possession, he cannot enter on himself; and the revocation is stronger than any claim can be.

1 Inst. 218 *b.*
1 Rep. 174 *a.*

78. It was resolved in Digges's case, that other uses might be limited or raised in the same conveyance by which the former uses were revoked; for inasmuch as the ancient uses cease, *ipso facto*, by the revocation, without claim or other act; the law will adjudge priority of operation of one and the same deed, although it be sealed and delivered at one and the same instant: therefore, in construction of law, it shall first be a revocation and cesser of the ancient uses; then a limitation and raising of the new ones: for the best construction of the statute of uses was, to make them subject to the rules of the common law: according to which, if two acts were done by one and the same means, and took place in one and the same instant, the law would so construe them, that that act should be taken to precede, which would give efficacy to the entire instrument.

Idem.

Fitzwilliam's Case, 6 Rep. 33.

Will not defeat a prior Estate.

79. The execution of a power will not however defeat an estate, previously created by the person who executes it.

Goodright v. Cator, Doug. 477.

80. An estate was limited, in consideration of marriage, to A. for life, &c., and a power was given to A., with the consent of the trustees, to revoke all the uses. A. conveyed away his life estate, for securing an annuity, to a person for 99 years, if he should so long live; and afterwards, with the consent of the trustees, he revoked all the uses of the settlement. It was resolved that this revocation did not affect the estate granted, for securing the annuity.

TITLE XXXII.

DEED.

CHAP. XVII.

Where Equity will support a defective Execution of a Power.

1. *Equity will support a defective Execution.*
2. *In favour of a Wife.*
9. *In favour of a Husband.*
12. *In favour of Children.*
15. *Though provided for.*
16. *In favour of Creditors.*
17. *And of Purchasers for a valuable Consideration.*
20. *But not for Volunteers.*
22. *Where there is Fraud.*
24. *Where a complete Execution is prevented by Accident.*
25. *But a Non-execution will not be supplied.*

SECTION 1.

Equity will support a defective Execution.

WE have seen that the courts of law construed powers strictly, and required that in the execution of them every circumstance prescribed should be complied with; but the courts of equity have assumed a jurisdiction in matters of this kind, and have supplied a defective execution of a power in several cases. 1°. Where there has been a consideration; as for securing a jointure to a wife, or a sum of money to a husband; or making a provision for younger children, or for payment of debts; and no better on the other side. 2°. Where there is any fraud; or the party is guilty of any deceit or falsehood, by which the execution is prevented; for the person in remainder shall not take advantage of his own wrong. 3°. Where a complete execution is pre-

vented by accident; for it would be unconscionable in the remainder-man to take advantage of these; provided the person having the power does all he can towards its execution.

In favour of a Wife.

2. It has been determined in several cases, that a covenant, in marriage articles, to settle a jointure under a power, on an intended wife, should be deemed a good execution of the power; because a wife is considered, in equity, as a purchaser for a valuable consideration, of her jointure, or whatever else is stipulated before marriage for her benefit.

Clifford v. Burlington, cited 2 P. Wms. 229. 2 Vern. 379.

3. Lord Clifford being tenant for life, with power to make a jointure, not exceeding 1,000*l.* a year, covenanted on his marriage with Lady A. Berkeley, to settle lands of 1,000*l.* a year on her; and accordingly after the marriage he settled part of the premises within the power on his lady for life, with a covenant that they were of the yearly value of 1,000*l.* and afterwards died: but these lands being only of the yearly value of 400*l.*, on a bill brought by the widow, there being lands of 1,000*l.* a year within the power, it was decreed, that a commission should be awarded to add lands to those formerly settled, so as to make up 1,000*l.* a year.

Fothergill v. Fothergill, 2 Freem. 256.

4. A tenant for life, with a power of appointing a jointure of 100*l.* a year, appointed 100*l.* a year to his wife for her jointure, out of a particular estate; and covenanted, in case the value should be defective, to make it up out of his other estate. The estate being defective, the widow brought her bill to have it supplied out of the other estate. A decree was made accordingly; and it was held by the Lord Keeper, and the Master of the Rolls, that whenever a conveyance is made upon a good consideration, if there be any defect in the execution of it, the

Court of Chancery has always supplied the defect, particularly in the case of a power, as where any circumstances were omitted in the execution of it: and one reason given was, because the circumstances were imposed only that the party might not be surprised in the execution of it; and it was further held, that payment of debts, provision for a wife and children, marriage, or purchases, were considerations for which the Court had supplied such defects.

Alford v. Alford, cited 2 P. Wms. 230.

5. Gregory Alford settled land on himself for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to Francis Alford for life, &c.; with power to Francis Alford, after the death of Gregory and his wife, or any after-taken wife of Gregory, to settle so much of the premises, not exceeding 100 *l.* a year, in jointure to a wife. Francis Alford, in the lifetime of Gregory, covenanted, in consideration of marriage, to settle lands of 100 *l.* a year upon his then intended wife; and afterwards Gregory Alford and his wife died without issue: and then Francis Alford died without issue, whereby the premises went to the remainder-man. The widow of Francis Alford, having brought her bill against the remainder-man, to make good the jointure; it was decreed by Sir John Trevor M. R., on considering many precedents, that the covenant to make this jointure was a good execution of the power; and that the wife was well entitled to the 100 *l.* a year, and to all the arrears from her husband's death.

It is observable, that Francis Alford entered into this covenant in the lifetime of Gregory, so that it might be reckoned a sort of strain to call this an execution of the power, before the very commencement thereof; but it showed how much the powers and

the execution of them were favoured, when for a valuable consideration.

Coventry v. Coventry, Max. in Eq. 2 P. Wms. 122.

6. Lord Coventry being tenant for life under his father's will, with a power, by any writing under his hand and seal, to settle any part of the estates comprised in the will, not exceeding 500*l.* a year, on any woman he should marry, for her jointure; so as such wife brought a portion equivalent to such a jointure. Lord Coventry, in consideration of a marriage, and 10,000*l.* portion, by articles previous to the marriage, covenanted with trustees, according to the power given to him by his father's will, or otherwise, to settle lands of the value of 500*l.* a year upon his intended wife, as her jointure. The marriage was solemnized; and soon after Lord Coventry went to his country seat, and gave the articles to his steward, with directions to look over his rental, and find out an unincumbered part of his estate to settle as a jointure. A part of the estate being fixed upon, and a particular made thereof, a settlement and appointment of it was accordingly drawn and engrossed, and left with Lord Coventry's steward for execution: from various accidents the execution of this deed was delayed, and Lord Coventry died without having executed it. On a bill brought by the widow against the remainder-man, under the will, and the personal representatives of Lord Coventry, the principal question was, whether the covenant contained in the marriage articles should be deemed a good execution of the power in equity.

Lord Macclesfield, Sir Joseph Jekyll, M. R., Baron Price and Baron Gilbert, were clearly of opinion, that the covenant contained in the marriage articles operated, in equity, as an execution of the power; and a charge and lien on the remainder. And the

Court declared, that the deed of settlement having been prepared and engrossed by the direction of Lord Coventry, the same ought to be taken to be a specification of the lands to be settled on the plaintiff; and the lands therein mentioned ought to be bound thereby, and by the marriage articles, although the said deeds of settlement were not actually signed and sealed by Lord Coventry.

7. A power expressly directed to be executed by deed, will, in equity, be deemed to be well executed by a will, where it is in favour of a wife.

8. A husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first and other sons in tail male, with a power to the husband to make a jointure on his wife, by a deed under his hand and seal. The husband having made no provision for his wife, and being in the Isle of Man, by his last will, under his hand and seal, devised part of the lands within the power to his wife for her life. It was objected, that this conveyance, being by a will, was not warranted by the power, which directed that it should be by deed; and a will was a voluntary conveyance, and therefore not to be aided in a court of equity. But Sir Joseph Jekyll said, this was a provision for a wife who had none before; and within the same reason as a provision for a child, not before provided for. And as a court of equity would, had this been the case of a copyhold devised, have supplied the want of a surrender; so where there was a defective execution of a power, either for payment of debts, or provision for a wife or children unprovided for, he would supply any defect of this nature. The legal estate being in trustees, they were decreed to convey

Tollett v. Tollett, 2 P. Wms. 488.

Holt v. Holt, 2 P. Wms. 648.

an estate to the widow for life, in the lands devised to her by her husband's will.

In favour of a Husband.

9. A court of equity will also supply a defect in an appointment made by a wife, in favour of an intended husband.

Cotter v. Layer, 2 P. Wms. 622.

10. A copyhold estate was surrendered by C. Layer and Elizabeth his wife, to the use of Elizabeth for life, and afterwards to such uses as she, by any writing, or by her last will, attested by three witnesses, should appoint. Upon the death of C. Layer, Elizabeth did, by deed or writing attested only by two witnesses, upon a marriage agreed to be had between her and one Cotter, covenant to surrender the premises, to the use of her intended husband and herself, and the heir of Cotter; who covenanted on his part to settle an annuity of 30 *l.* a year on the said Elizabeth for life. It was objected, that these articles by Elizabeth Layer, to settle the copyhold premises on her second husband, were attested by two witnesses only, so not pursuant to the power, and consequently void. But Lord King said, these articles being for a valuable consideration, namely, that of marriage, though not in strictness pursuant to the power, he should supply the want of circumstances; in the same manner as he would the want of a surrender.

Sergeson v. Sealy, 2 Atk. 412.

11. William Pitt married Mrs. Speke, and by the marriage articles it was covenanted, that if there should be one son only, and no younger children, and the wife should survive the husband, she should have the power of disposing of 4,000 *l.* by deed or will, executed in the presence of three witnesses, to any person she should appoint; and this sum was to be charged upon the real estate of the husband. Mr. Pitt died, leaving only one son, and Mr. Speke married the widow; but before her second marriage,

she, by articles executed in the presence of two witnesses only, appointed the sum of 2,000 *l.* out of the 4,000 *l.*, to be for the use and benefit of her intended husband, during the coverture.

Lord Hardwicke said, the question was, whether the articles entered into upon Mrs. Speke's marriage with Mr. Speke amounted to an appointment within the power. He was of opinion, that it was a good appointment of 2,000 *l.* for the benefit of Mr. Speke: and notwithstanding it was insisted that it was a defective appointment, because there were only two witnesses, yet the Court of Chancery would supply the defect, where it was executed for a valuable consideration; much more where it was an execution of a trust only: and though the appointment was inaccurately expressed, and in an informal manner, it should still amount to a grant of the 2,000 *l.* to Mr. Speke.

12. A covenant will, in equity, be deemed a good execution of a power, where it is entered into for the benefit of younger children: because parents are under a moral obligation to provide for them. In favour of Children.

13. A person settled lands to the use of himself for life, and then, as to part, to his wife for life, for her jointure, then to the issue male of his own body, with several remainders over; with a proviso, that if he should have any younger children, it should be lawful for him, by deed or will, executed in the presence of two or more credible witnesses, to limit and appoint any of the said lands, except those limited in jointure, to such persons and for such estates as he should think fit, for raising 500 *l.* a piece for younger children; to be paid at such times, and in such manner, as he by such deed or will should declare; and covenanted to do accordingly. The person to whom Smith v. Blanfrey, Gilb. R. 166.

this power was given died, leaving several younger children; but did not make any appointment. Decreed, that this was a charge upon the lands, and bound the issue in tail; the covenant being looked upon as an execution of the appointment, in pursuance of the power.

Parker v. Parker, cited 10 Mod. 467. Gilb. R. 168.

14. A. having a power to charge lands with 7,000*l.* for younger children, by any writing under his hand, attested by three witnesses, did, in fear of sudden death, and being absent from home, and so not being able to have a sight of the deed in which this power was contained, by a paper attested by two witnesses, charge his estate with 8,000*l.* instead of 7,000*l.* for his younger children. The Court of Chancery supplied the defect for the 7,000*l.*

Though provided for.

15. Lord Hardwicke has said, that in cases of aiding the defective execution of a power, either for a wife or a child; whether the provision has been for a valuable consideration or not, has never entered into the view of the Court. But being intended for a provision, whether voluntary or not, has been always held to entitle the Court of Chancery to give aid, to a wife or child, to carry it into execution, though defectively made. Neither is it material that a wife or child who comes for the aid of the Court, to supply a defective execution of a power, must be entirely unprovided for. The general rule that the husband or father are the proper judges what was the reasonable provision for a wife or child, was a good and invariable rule. And when a father had done any thing extravagant, the Court did not break through the general rule, when they set it aside, but went upon a collateral reason, that this extravagant provision, either for a wife, or one child only, was a prejudice and injury to the rest of the

family; and that one branch ought not to be improperly preferred, to the ruin of the rest.

16. It is laid down by Lord C. J. Treby, in Bath and Montague's case, that where a person, having a power of appointment, executed it for the payment of his debts, but the circumstances of the power were not exactly observed, there should be relief in equity. Because payment of debts was a most conscientious thing, and fit for a court of conscience to take care of, and see performed; and the precedents had all gone that way.

In favour of Creditors. 3 Cha. Ca. 89.

Pollard v. Grenvill, 1 Cha. R. 98.

17. Purchasers for a valuable consideration have always been favoured in equity. For there the substantial part of every contract is the consideration, and for that the right is transferred. It also being a rule in equity, that what ought to have been done is considered as actually done; the Court of Chancery will supply any defect in the execution of a power, where there is a valuable consideration.

And of Purchasers for a valuable Consideration. 3 Cha. Ca. 68. Cowp. 267.

18. It has been generally understood, that equity would not support a defective execution of a power of leasing against a remainder-man. It is however said, by Sir J. Trevor M. R., that where a lease is voluntary, there, if it be not good at law, it shall not be made good in equity. But if a lease is made to a tenant at rack rent without fine, which is voluntary; yet, if the tenant has been at any considerable expence in building or improving, equity will supply the defective execution of the power.

ante, c. 15. § 2.

An. 2 Freem. 224.

19. In modern times a lessee at rack rent has been considered as a purchaser for a valuable consideration. And Lord Kenyon has laid it down, that a lease being granted for a valuable consideration, and merely defective in point of form; a court of equity would interfere, and direct a proper lease to be granted.

7 Term R. 480. Shannon v. Bradstreet, 1 Scho. & Lefroy, 52.

But not for Volunteers.

20. It should however be observed, that courts of equity will give no assistance, where both parties are volunteers. For where the question, as to the execution of a power, lies between an appointee under the power, without consideration, and a remainder-man; the latter having a vested interest, will be clearly entitled against the former, unless the appointee can show that the interest of the remainder-man is devested, by an actual execution of the power in due form.

ante.

21. In the case of Serjeson v. Sealy, the widow of Mr. Pitt made a voluntary disposition of 2,000*l.*, the remainder of the 4,000*l.* And Lord Hardwicke said, that this was not an appointment for a valuable consideration, but only a voluntary disposition; and therefore, as the will under which it was given, was not executed in the presence of three witnesses, it had not pursued the power, and consequently was a void appointment.

Where there is Fraud. 3 Cha. Ca. 89. 92. 122.

22. As it is one of the principal objects of a court of equity to relieve against fraud and deceit, it has been long established, that where a party interested prevents a strict compliance with the circumstances required in the execution of a power, from immoral motives, there, if the person who has the power, does any act that plainly evinces his intention to execute it, such act will in equity be deemed a good execution of it.

Gilb. Cha. 306.

23. Thus, where the remainder-man gets the deed into his possession, and will not allow the tenant for life to have a sight of it; there the tenant for life may execute conveyances, and though he does not pursue the terms of the power, yet equity will relieve, even in favour of a volunteer; because the remainder-man shall not take advantage of his own wrong, by withholding from the tenant for life the sight of his power.

24. It is also an object of a court of equity to relieve against all manner of accidents, even in favour of volunteers; it being unconscionable for a remainder-man, to take advantage of them. It was therefore agreed in Bath and Montague's case, that if a person made a conveyance, with a power of revocation by a deed executed in the presence of four privy councillors; and he was sent by the king to Jamaica, where that circumstance could not possibly be complied with; equity would allow him to revoke without it.

Where a complete Execution is prevented by accident.

3 Cha. Ca. 68.

25. Although a court of equity will, in many instances aid a defective execution of a power; yet it will never interpose in the case of a non-execution of a power; which always leaves it to the free will and election of the party to whom the power is given, either to execute it or not. For which reason equity will not say he shall execute it; or do that for him, which he does not think fit to do for himself. And the intervention of death, between a man's resolving to execute a power and his actually executing it, is not of itself, even in cases where the act is of such a nature as a man is under an obligation to perform, a ground for the interposition of a court of equity in favour of the person intended to have been benfited by the doing thereof; although some steps be taken towards completing such intention.

But a Non-execution will not be supplied.

2 P. Wms. 490.

Arundel v. Philpot, 2 Vern. 69. 3 Cha. Ca. 70.

26. A. having a power of revocation, by any writing under his hand and seal, and being desirous to provide for his daughters, prepared notes in writing, which he declared should have the effect of his last will, and which he called instruments for his counsel to draw up his last will in form. His counsel drew a writing, and had the same engrossed, leaving blanks for the names of the trustees. A. died without executing this will. A bill being exhibited by the

Smith v. Ashton, Finch, 273. 1 Freem. 308. 1 Cha. Ca. 264.

daughters, for the portions given them by these instructions, an issue was directed to try whether these notes were part of the last will of A., and a verdict was given that they were a will; whereupon the Court decreed them to be a good execution of the power.

Treat. of Eq. B. 1. c. 4. § 25.

27. Mr. Fonblanque observes, that this case has been cited to prove that a non-execution of a power will be aided in equity; but that it is clear from the circumstance of directing an issue to try whether these notes amounted to a will, that the Court did not think the accident of the father's death, before he had completed his intent towards his younger children, a sufficient foundation for relief; it therefore directed a trial to ascertain whether these notes were a will; and it being found that they were, the question then was reduced to this, whether the Court could relieve the younger children, in respect that the will wanted circumstances which were required by the power to attend the execution of it; which, as between the younger children and the heir, it certainly would do; the case being, by the verdict, a case of a defective execution only.

Piggot v. Penrice, Com. Rep. 250.

28. A married woman having a power of revocation and appointment, and being sick, wrote a letter to her attorney who had drawn her settlement, desiring he would prepare a deed whereby she might give the inheritance to her niece, and on the back of the letter it was written that the attorney should keep it a secret. The attorney however communicated this letter to the husband, and several days intervened, during which the attorney swore that he did not propose any method to the husband, or use any means, to prevent the revocation. The question was, whether this letter amounted to a revocation in equity; and it was decreed that it did not.

29. In the case of Lassells v. Lord Cornwallis, Lord Keeper Wright said, the Court of Chancery had not gone so far, as where a person had a power to raise money, if he neglected to exercise that power, to do it for him; although he thought it might be reasonable enough, and agreeable to equity, in favour of creditors. But in a modern case it was held, that where a person had a power of charging lands with 2,000 *l.* which he never executed, the power could not be considered as assets for payment of debts. 2 Vern. 465.

30. By the settlement made between Sir John Coghill and his son, certain estates were limited to him for life, with a power to charge them with the payment of 2,000 *l.* Sir J. C. having died in debt, his creditors contended that this sum was assets, for payment of his debts. Holmes v. Coghill, 7 Ves. 499.

The Master of the Rolls (Sir W. Grant) declared, that the power not having been executed, the money could not be raised.

Upon an appeal, Lord Erskine said, the general question was, whether the sum of 2,000 *l.* which Sir J. C. had power to raise, was to be considered as assets. The first ground upon which that might be maintained was, that *jus disponendi* was to be considered as property itself. If there was no case directly in point, the result of the authorities was, that a general power of disposition, not restrained as to the objects or the mode, was in effect property: The distinction between power and property being, that the former was subject to some restraint, either as to the objects, or the mode of disposition; the latter consisting in general and unconfined dominion. 12 Ves. 206.

S. There was no doubt, where an attempt was made to execute a power in favour of creditors, but the execution was defective, the defect would be 1 Cox. Rep. 131.

supplied. The law of the Court was also admitted, that if a power was executed in due form, but in favour of a volunteer, the Court would take the subject from that person, and give it to the creditors of him who had the power. But where there was a complete want of execution, it could not be supplied for creditors. The decree was affirmed.

George v. Milbanke, 9 Ves. 190.

31. Where a person has a power of revocation, by the exercise of which he may acquire an estate in fee simple, the land will be liable to debts due to the Crown.

Coke's Case, Godb. 289. Jenk. Cent. 7. Ca. 19.

TITLE XXXII.

DEED.

CHAP. XVIII.

How Powers may be extinguished and destroyed.

1. *A complete Execution.*
3. *Powers relating to the Land may be released.*
5. *Powers appendant barred by a Feoffment.*
6. *By a Fine or Recovery.*
7. *And by a Bargain and Sale, &c.*
9. *May be surrendered or merged.*
11. *A Power to lease not barred by a Charge.*
13. *Powers in Gross not barred by a Conveyance of the Land.*
15. *Unless the Estates are devested.*
18. *Collateral Powers not barred by any Conveyance.*
22. *A Power may be forfeited to the Crown.*
23. *In what cases it may be executed.*
28. *A Power may be merged.*
30. *Where there is no Object of a Power, it becomes void.*

SECTION 1.

A complete Execution.

THE first and most obvious mode by which powers, whether relating to the land, or collateral to it, may be extinguished, is by a complete execution of them. And it was formerly held, that even a partial execution of a power operated as an extinguishment of it; but this doctrine is not now deemed to be law.

Zouch v. Woolston, ante, c. 16. § 39.

2. If a power reserved over a legal estate, is defectively executed at first, it may be executed over again, and the last execution shall stand; the first being a mere nullity.

Barnad. R. 111.

Powers relating to the Land may be released. 1 Rep. 174 *a.*

3. Powers relating to the land, whether appendant, or in gross, may be destroyed by a release to any person having an estate in possession, remainder, or reversion, in the lands to which the power relates: for where powers are given to a person having an estate or interest, either present or future, in the land, the exercise of them is considered as a species of property, advantageous to him; and there is no reason why he should not be allowed to depart with, or exclude himself from, the benefit of it.

Albany's Case, 1 Rep. 110 *b.*

4. Francis Bunny enfeoffed Miles Hitchcock, to the use of the said Francis for life, and after to the use of David Bunny in tail, &c., with a proviso that it should be lawful for the said Francis to alter, change, or determine any of the uses limited in the said deed. Afterwards Francis Bunny, by his deed, did remise, release and quit claim to the said Miles and David, the said condition, proviso, and agreement, and all his power, liberty, and authority aforesaid. It was resolved that the power was destroyed by this release.

Powers appendant barred by Feoffment. ante, c. 4.

ante, § 4.

5. Powers appendant may be barred by the feoffment of the persons to whom they are given; because a feoffment with livery is of such force that it excludes the feoffor, not only from all present, but also from all future rights and titles; and in Albany's case it was agreed by the Judges, that a power to revoke and limit new uses might be utterly gone and extinguished by a feoffment.

By Fine or Recovery.

6. Powers appendant may also be barred and extinguished by fine, or common recovery; of which an account will be given under those titles.

And by Bargain and Sale, &c. 1 Inst. 342 *b.* *n.* 1.

7. Powers appendant may also be extinguished by any of those conveyances which derive their effect from the statute of uses; and which are said to

operate without transmutation of possession; as a bargain and sale, covenant to stand seised, and lease and release. For whoever has any estate in the land, may convey it to another; and it would be unjust that he should afterwards be admitted to avoid, or do any thing in derogation of his own act. Any assurance therefore of this nature, which carries the whole of the grantor's estate, operates as a total destruction of the powers appendant to it.

8. It should however be observed, that a feoffment, or other conveyance of part of the land, is an extinguishment of the power, as to that part only; and the power remains, as to the residue. 1 Inst. 237 *a*. Hob. 313.

9. Where a person having a power appendant, makes a feoffment or other conveyance, only for the purpose of creating a particular estate, as an estate for life, or a term for years; this only suspends the execution of the power, during the continuance of the estate created. And where such assurance only creates a charge on the estate, it necessarily subjects the estate to that charge. May be suspended or charged.

10. Where a person who had a power to revoke a use, made a lease for years, and levied a fine for assurance of the lease, without express use; the power of revocation was held not to be extinguished by the fine, but only suspended during the term. Bullock v. Thorne, Moo. 616.

11. In some cases a power of leasing, reserved to a tenant for life, will not be extinguished or suspended by his conveyance of the estate; where such conveyance is made only to create a particular charge, and does not amount to a departing with the whole estate. A Power to lease not barred by a Charge.

12. Lord Onslow being tenant for life, under his marriage settlement, with power to make leases, conveyed his life estate by lease and release to one Briscoe and his heirs, in trust to apply the profits in Ren v. Bulkeley, Doug. 292.

payment of an annuity of 150*l.* during the life of Lord Onslow, and to pay the surplus to Lord Onslow himself. In the year following Lord Onslow conveyed all his estate to trustees for 99 years, if he should so long live, for payment of his debts; but with an express reservation as to all leases granted, or to be granted. Lord Onslow afterwards made a lease of the premises in question for 21 years, pursuant to his power; and the question was, whether the conveyance to Briscoe had destroyed the power of leasing. Lord Mansfield said, powers came into the courts of common law with the statute of uses; and the construction of them, by the express direction of the statute, must be the same as in courts of equity. The creation, execution, and destruction of them depended on the substantial intention and purpose of the parties. It was said, first, that the grantor, in this case, was not in possession, and that it was necessary he should be, to execute the power: but he thought possession here meant the receipt of the rents and profits, which were applied to his use. If actual possession were necessary, a leasing power could never be executed where land was in the hands of a tenant. Secondly, it was contended, that by granting away his life estate, he extinguished his power. Certainly where the whole life estate was granted away, by the intention of the parties, the power must be at an end and could not afterwards be exercised, to the prejudice of the grantee: but the conveyance here was only to let in a particular charge, subject to which the rents and profits still belonged to Lord Onslow, and the lease could not prejudice the security, nor the remainder-man, for the best rent must be reserved. It would therefore be contrary to the intention of all parties, to hold

that the power was extinguished, by the conveyance to Briscoe.

Powers in Gross not barred by a Conveyance of the Land. Gilb. Uses, 142, 3.

13. With respect to those powers relating to land, which are called powers in gross; as the estates to be created by them do not fall within the compass of the estate of the person to whom they are given, a mere alteration of that estate will not affect them: hence if a tenant for life, with power to settle a jointure, or to create a term for years, to commence from his decease, conveys away his life estate by bargain and sale, covenant to stand seised, or lease and release, these conveyances will not destroy his powers; and if he should even make a conveyance in fee, by any of these assurances, as they pass no greater estate than the grantor has a right to convey, the power would not be affected by them.

Jenkins v. Keymis, 1 Cha. Ca. 103.

Edwards v. Slater, Hard. R. 410.

14. A man settled lands by fine, to the use of himself for life, with a clause, that if he should make a jointure to his wife, and make a lease for 31 years, to commence after his death, for raising 3,000*l.* for his daughters portions, that then the cognizees should stand seised to those uses; and limited several remainders over in tail, the reversion in fee to himself. Afterwards he made a jointure pursuant to this power, and then bargained and sold the lands to other persons in fee, by deed enrolled, in trust to raise portions. The bargainee afterwards conveyed the lands to him by feoffment. Then he made a lease for 31 years, to begin after his death, for raising 3,000*l.* for the portions of two of his daughters only; and he and his wife after that levied a fine, *sur cognizance de droit*, &c.; and afterwards he died. A person, by the direction of the lessee for 31 years, entered; and whether his entry were lawful or not, was the question.

Lord Hale and Baron Rainsford were of opinion, that the power to make a lease for 31 years, to commence after the death of the lessor, was not destroyed by the bargain and sale (contrary to the opinion of Baron Turner), because it was a power in gross, and the estate for life had no concern in it: and yet such a power might, by apt words, be destroyed by release, or by fine or feoffment, which carried away and included all things relating to the land. But an assignment of *totum statum suum*, or other alteration of the estate for life, did not affect such a power.

Unless the Estates are devested.

15. Where a tenant for life, with a power to jointure, or to create any other estate, to commence after his own, conveys away his estate, by feoffment, to a stranger and his heirs; as this species of assurance not only transfers the estate which the feoffor might lawfully pass, but also a tortious fee, it follows that the whole inheritance is devested; and the seisin, out of which the uses created by the power were to be fed, is destroyed; by which means the power becomes extinct. And if the tenant for life levies a fine, or suffers a common recovery of the lands, the power will also be destroyed; for reasons which will be stated under those titles.

Pinne v. Peacock, Forrest, 41.

16. If the whole fee is in the terretenant, subject to the power; as where an estate is limited to A. for life, remainder to such uses as he shall appoint, remainder to A. in fee; there, if A. conveys the whole estate by lease and release to a stranger in fee, his power of appointment is destroyed; notwithstanding it is in the nature of a power in gross.

17. Where a tenant for life, with powers of leasing, jointuring, and charging, is obliged to part with the beneficial interest in the estate, he conveys it to

a person for 99 years, if he shall so long live; by which means the freehold remains still in him, and his powers are not destroyed. And where he joins with the remainder-man in suffering a common recovery; the conveyance to make a tenant to the *præcipe* is usually during the joint lives of the tenant for life, and the intended tenant to the *præcipe*; by which means the reversion remains in the tenant for life, and all his powers are thereby preserved. 1 Inst. 203 *b.* *n.* 1.

18. At common law a naked authority is not barred by a release or any other conveyance of the land. Thus, Lord Coke says, if a man by his will devised that his executors should sell his lands, and died; if his executors released all their right and title to the land to the heir, this was void; for that they had neither right nor title to the land, but only a bare authority. Collateral Powers not barred by any Conveyance. 1 Inst. 265 *b.* 342 *b.*

19. Upon the introduction of uses, this doctrine was adhered to; and it was held in 15 Hen. VII., where *cestui que use* devised that his feoffees should sell his land, and died; and afterwards the feoffees made a feoffment over; that the feoffees might sell against their own feoffment; because the power to sell was merely collateral to the right of the land. Idem. 1 Rep. 111 *a.*

20. When powers of revocation and appointment were introduced, the Judges, reasoning by analogy from the preceding cases, laid it down, that powers collateral to the land could not be released, nor were they extinguished or destroyed by a feoffment, or any other conveyance of the land: for these powers being given to strangers, for the benefit of some third person, the extinction of them would be injurious to that person.

21. Thus it said by Popham, Ch. Just. in Digges's case, that if a feoffment in fee be made to A. to divers 1 Rep. 174 *a.* Moo. 605.

uses, with a proviso, that if B. shall revoke, the uses shall cease: there B. cannot release his power; and a feoffment by him shall not extinguish it; for the power of B. is merely collateral, and the land doth not move from him, nor shall the party be in by him, nor under him; and neither a fine nor a recovery will in this case operate as a bar to the power.

Vide Tit. 35 & 36.

A Power may be forfeited to the Crown.

22. A power of revocation may, in some cases, be forfeited to the Crown, by an attainder for high treason, and by that means become vested in the King. Thus, if a person is tenant for life, with a power of revocation over the estates in remainder, and he is attainted of high treason, his estate for life, and his power of revocation, will both be forfeited.

In what Cases it may be executed.

23. In a case of this kind, if the execution of the power of revocation be attended with circumstances inseparably annexed to the person of him to whom the power is given, it cannot be executed by the Crown.

Duke of Norfolk's Case, cited 7 Rep. 13 *a*.

24. Thomas Duke of Norfolk conveyed his estate to trustees, to the use of himself for life, remainder to the use of his eldest son in tail, with several remainders over, with a proviso, that it should be lawful for the duke to revoke those uses, by any writing under his proper hand, subscribed by three witnesses. The duke was afterwards attainted of high treason; and it was determined that this power of revocation, although forfeited, could not be executed by Queen Elizabeth; because the circumstances prescribed in the execution of the power were so inseparably annexed to the person of the duke, that no one but himself could execute them.

Smith v. Wheeler, 1 Vent. 128.

25. But if the execution of a power of revocation be not attended with circumstances inseparably annexed to the person of him to whom the power is

given; there, in case of an attainder for high treason, the power may be executed by the Crown.

26. Sir Francis Englefield left the kingdom in the first year of Queen Elizabeth by licence, and remained abroad beyond the time of his licence. The Queen, by her warrant under the privy seal, required him to return, and upon his not complying, seised his lands. Sir Francis Englefield, by indenture executed at Rome, and made between him and Francis Englefield his nephew, covenanted for the advancement of his blood, &c. to stand seised to the use of himself for life, remainder to the use of his said nephew and the heirs male of his body, remainder to the use of the right heirs of his nephew; with a proviso, that as his nephew was an infant, so that his proof was not then seen, and because the uncle did not think it convenient to settle the said inheritance in the nephew absolutely, so long as the uncle should live, therefore if the uncle, by himself, or by any other, should, during his natural life, deliver or offer to the nephew, a gold ring, to the intent to make void the uses, then all the uses should be void. Englefield's Case, 7 Rep. 11.

Sir Francis Englefield was afterwards indicted for high treason, for compassing the Queen's death, on which he was outlawed. And in 28 Eliz. an act of attainder for high treason was passed against him. Queen Elizabeth, by letters patent, reciting the settlement, and power of revocation, on tender of a gold ring, appointed two persons to deliver a gold ring to Francis Englefield, which he refused. The question was, whether this tender of a gold ring to Francis Englefield, was a good revocation of the uses.

It was argued, that the execution of this power was not given to the Queen by the act of attainder, because it was inseparably annexed to the person of

Sir Francis Englefield. For although the tender of a ring was a thing that might be done by any person, yet, as that circumstance was only a mark of the intention of Sir Francis Englefield, which intention must arise from the opinion he himself should form of his nephew's future disposition and conduct, therefore no person but Sir Francis himself could direct the tender of the ring. But the Judges held, that the whole force and effect of the power of revocation depended on the tender of the ring, so that the Queen might lawfully execute the power, and therefore judgement was given for the Crown.

27. Lord Coke observes, that the counsel of Francis Englefield were not satisfied with this judgement; and therefore advised a writ of error; but at the next parliament a special act was passed to establish the forfeiture in the Queen. And Lord Hale has observed on this case, that if Sir Francis Englefield had died before the Queen had made the tender, then the condition, which was only limited to him during his life, had been determined, and the Queen could not have tendered; for the attainder could not lengthen the condition, longer than the first limitation.

1 Hale P. C. 245.

Vide Hardwin v. Warner, Palm. 429. Lat. 24. Smith v. Wheeler, 1 Vent. 130.

A Power may be merged.

28. A power given to a person, having a particular estate in the land, may be merged by his acquisition of the fee simple.

Cross v. Hudson, 3 Bro. R. 30.

29. An estate was limited to John Hay for life, remainder to his wife for life, remainder to the children of the marriage in tail, remainder to the survivor of the husband and wife in fee; with a power to the husband, by deed or will, to charge the lands with a rent. There was no issue; and the husband in the lifetime of his wife, by will, reciting the power, devised, in execution of his power, and of

all other powers, a rent of 100 *l.* a year; and survived his wife.

Lord Thurlow said the power was merged; but he was also of opinion, that though the power was gone, and the will purported to be an execution of the power; yet as he evidently meant the charge should take place on the estate at all events, it must be sustained as a charge on the estate, out of the interest he had at his death.

30. Where there is no object for the execution of a power, it of course becomes void.

Where there is no Object of a Power, it becomes void. Roe v. Dunt, 2 Wils. R. 336.

31. Thus where a person had a power given him by his marriage settlement, to appoint the lands to the children of the marriage; and for default of appointment, then to all the children equally; and there was but one child; an appointment to that child was held to be void, because he took under the limitation in the settlement.

TITLE XXXII.

DEED.

CHAP. XIX.

Of the Construction of Deeds.

1. *General Rules.*
23. *Words sometimes rejected.*
26. *Omissions supplied.*
27. *Settlements rectified.*
29. *Where a Deed is uncertain, it is void.*
31. *Some Operation is always given to a Deed.*
40. *Where the Grantee has an Election how to take.*
43. *No Averments admitted against Deeds.*
44. *But admitted in support of them.*
51. *And where there is an Ambiguity.*
54. *And where there is Fraud.*
55. *Where a Deed operates as an Estoppel.*
61. *Construction of Conveyances to Uses.*
65. *Of Declarations of Trust.*
67. *Of Articles of Agreement.*

SECTION 1.

General Rules. Touch. 86.

IN the construction of deeds, there are two sorts of rules: one general, and applicable to every kind of deed: the other particular, and applicable only to some kind of deeds; or to some particular part of a deed.

1 Inst. 36 a. Plowd. 154. 160.

2. With respect to the first sort, it is a maxim of the highest antiquity in the law, that all deeds shall be construed favourably, and as near the apparent intention of the parties as possible, consistent with the rules of law—*Benignæ sunt faciendæ interpretationes chartarum, propter simplicitatem laicorum; ut res magis valeat quam pereat.*

3. If, however, the intention of the parties be contrary to the rules of law, it will then be otherwise;

for it would be highly improper and inconvenient to permit private persons to contradict the general rules of law. Thus, if a person conveys lands to another and his heirs for 21 years; the executor of the grantee, and not his heir, will be entitled to the land; because it is a rule of law that a term for years is but a chattel. 1 Inst. 46 *b*.

4. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.* And where the intention is clear, too minute a stress ought not to be laid on the strict and precise signification of words: according to another maxim—*qui hæret in litera, hæret in cortice.* 2 Saund. 167.

5. The construction ought to be made on the entire deed, and not merely on any particular part of it. *Ex antecedentibus et consequentibus fit optima interpretatio.* Therefore every part of a deed ought, if possible, to take effect; and every word to operate. Carter, 98. 112. 1 P. Wms. 457. Vaugh. 167.

6. *Verba posteriora propter certitudinem addita ad priora, quæ certitudine indigent sunt referenda.* And if certainty once appears in a deed, and afterwards in the same deed it is spoken indefinitely, reference shall be to the certainty which appears. 4 Leon. 248.

7. Subsequent words shall not defeat precedent ones, if by construction they may stand together. But where there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand. Hard 94. 6 Mod. 107.

8. *Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea; interpretanda est carta secundum verba specialia.* But it is also a maxim, that *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.* Therefore, when the deed at first contains special words, and afterwards concludes in general words; both words, as well general as special, Carth. 120.

shall stand: for otherwise the general words would have no effect.

6 Rep. 38 *b.* Cromwell v. Grumsden, 1 Ld. Raym. 335.

9. *Mala grammatica non vitiat chartam:* so that neither bad Latin, nor bad English, will make a deed void.

10 Rep. 28 *a.* Atto v. Hemmings, 2 Buls. 282.

10. The law will construe that part of a deed to precede, which ought to precede. As if a person makes a lease reserving rent, *habendum* for 20 years; so that the reservation is placed before the *habendum*, yet it is good; and the Judges by their construction are so to marshal the words, as to make it a reservation of rent for the whole term.

1 Inst. 20 *b.*

11. It is a maxim of law, that *idem semper refertur proximo antecedenti.* Therefore if a man gives lands to A. in tail, remainder to B. *in eadem forma;* B. will take an estate tail. But if an estate be limited to A. for life, remainder to B. in tail, remainder to C. *in forma prædicta;* it is void for uncertainty.

Bro. Ab. Grants, 89. 2 Bulst. 298.

12. Ancient charters are to be taken according to the ancient usage: for there are many old grants generally and insufficiently made, so that at this day they would be void: but being before time of memory, and having been used since, therefore they are good; and many liberties and franchises used thereby are likewise good.

1 Inst. 183 *a.*

13. A deed is always construed most strongly against the grantor.—*Verba chartarum fortius accipiuntur contra proferentem; et quælibet concessio fortissime contra donatorem interpretanda est.* For the principle of self-interest will make men sufficiently careful not to prejudice themselves, by using words of too extensive a meaning. And all manner of deceit is hereby avoided in deeds; for people would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them.

14. Thus, if lands be let in the premises of a deed, or a rent granted, generally; an estate for life will pass. So if a man makes a lease for the life of B., and afterwards releases to A. all his right in the land, A. will take an estate for his own life; because that is higher than an estate for the life of another. 1 Inst. 42 *a*. 183 *a*. 1 Inst. 273 *b*.

15. Where general words stand alone in a release, unqualified by any recitals, they shall be construed most strongly against the releasor. But where there is a particular recital in a deed, and general words of release are afterwards inserted; the generality of the words shall be qualified by the recital.

16. A release was executed in pursuance of an award; in which a release of all demands was inserted. It was contended, that the words were sufficient to release a growing rent: but it was determined, that they should not have so extensive an effect; because they were qualified by a particular recital. Henn v. Handson, 1 Sid. 141. Thorpe v. Thorpe, 1 Ld. Raym. 235.

17. A distinction must however be made, in cases of this kind, between an indenture and a deed-poll. For the words of an indenture executed by both parties are to be considered as the words of both: but in a deed-poll, they are the words of the grantor, and shall be taken most strongly against him. 1 Leon. 246. Owen, 251. 8 Mod. 312.

18. If the words of a deed will bear two different senses, the one conformable to law, and the other against it; that sense shall be preferred which is conformable to law: for it is also a maxim, *quod legis constructio non facit injuriam*. Thus if a tenant in tail creates an estate for life generally, it shall be only for the life of the tenant in tail; for otherwise it would operate as a wrong. 1 Inst. 42 *a*. 183 *a*. & *b*.

19. The word *and* is sometimes construed in a disjunctive sense, in order to support the intention of the parties.

Chapman v. Dalton, Plowd. 289. 1 Inst. 225 *a.*

20. A person leased lands for 21 years, and covenanted with the lessee to make to him *and* his assigns a lease for 21 years, to commence after the end of the first term. The lessee died, and his executor brought an action of covenant for a second lease. The Court held that the word *and* should be construed *or*, in the disjunctive; therefore that the lessor was bound to make a new lease to the executor of the lessee, as being his assignee in law.

4 Mod. 156.

21. It was held in the case of Davis v. Speed, that no estate will arise by implication in a deed: though in conveyances deriving their operation from the statute of uses, a use may arise to the owner of the estate by implication; to which the statute will transfer the legal estate.

22. In some cases deeds have been construed according to the manner in which the parties themselves appeared to have understood them. But this doctrine has been lately denied; and it has been laid down, that a legal instrument shall not be construed by the acts of the parties.

Cook v. Booth, infra, c. 24.

Words sometimes rejected.

23. Where there are any words in a deed that evidently appear repugnant to the other parts of it, and to the general intention of the parties, they will be rejected, as insensible. For the words are not the principal things in a deed, but the intent and design of the parties.

Tit. 16. c. 1. § 48.

24. Thus, in the case of Berrington v. Parkhurst, where lands were limited to A. for 99 years, if he should so long live; and from and after the death of A. or other sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs, during the life of A., to preserve contingent remainders; it was determined that the words "and from and after the death of A." should be re-

jected, as insensible and repugnant to the subsequent words.

25. An evident omission or mistake will be supplied in a deed. Thus in a case where the name of the bargainor was omitted in the operative part of a bargain and sale, it was supplied. Omissions supplied.

26. Lord Say and Sele conveyed his estate to B. K., for the purpose of making him tenant to the *præcipe*, by a deed of bargain and sale, which was worded in the following manner: —"Witnesseth that for and in consideration of five shillings by the said B. K. to the said Lord S. in hand paid, as also for the cutting off of all entails, &c., and for settling and assuring the same to the said Lord S. and his heirs, doth bargain, sell, and confirm unto the said B. K., &c. The Court was of opinion that this deed passed the freehold; because such was the plain intention of it. Lloyd v. Say & Sele, 1 Salk. 341. 10 Mod. 40.

Upon a writ of error in the House of Lords, it was contended, that this bargain and sale could not convey any estate, because it was not mentioned therein that any person did bargain and sell. On the other side it was argued, that it appeared *prima facie* that the consideration money was paid by B. K. to Lord S., and that it was for barring all entails and remainders in the premises, and assuring the same to Lord S. and his heirs. That it appeared, as well by this deed as by the evidence on the trial, that the lands therein mentioned were the estate of Lord S,; and that the intent of the deed was to make B. K. tenant of the freehold, in order that a common recovery might be suffered: therefore the Court of K. B. was of opinion that the freehold was well conveyed by the deed. The judgement was affirmed. 4 Bro. Parl. Ca. 73.

27. Where there is an evident mistake in a marriage settlement, the Court of Chancery will rectify it. Settlements rectified.

Uvedale v. Halfpenny, 2 P. Wms. 151.

28. In a settlement lands were limited to the husband for life, remainder, as to part, to the wife for life, remainder of the whole to the first and other sons of the marriage in tail male, remainder to trustees for 500 years, to raise portions for the younger sons and daughters: the trust of the term was declared to be to secure maintenance for the younger children from the husband's death, and to pay the portions of the younger sons at 21, and of the daughters at 21 or marriage. The eldest son suffered a recovery of the estate tail. A bill was brought to rectify the mistake in the settlement, in placing the term after the limitation to the first and other sons in tail; whereas the term should have come in before that limitation. Sir J. Jekyll decreed that the settlement *should* be rectified, by placing the term of 500 years before the estate tail.

Targus v. Puget, 2 Ves. 194.

Where a Deed is uncertain, it is void. 1 Inst. 20 *b*.

29. Where the words of a deed are so uncertain that the intention of the parties cannot be discovered, the deed will be void. Thus a gift to A. or B. or to one of the children of J. S., he having four children, is void for uncertainty.

Windsmore v. Hobart, Hob. 313.

30. Lands were demised to T. H., *habendum* to the said T. H. and three other persons *successivè*. Resolved, that no one could take immediately but T. H., because he was the only party to the deed, for the rest were only named in the *habendum*: and that the others could not take by way of joint remainder, on account of the word *successivè*, nor in succession; on account of the uncertainty who should take first, and who should follow.

Some Operation is always given to a Deed. Hob. 277.

31. Where a deed cannot operate in the manner intended by the parties, it will be construed in such a manner as to operate in some other way. *Quando quod ago non valet ut ago, valeat quantùm valere potest.*

In consequence of this principle it has been determined, that a deed which was intended to operate as a lease and release, or bargain and sale, but could not take effect in that manner, should operate as a covenant to stand seised. ante, ch. 9. § 27. ch. 10. § 4.

32. A deed intended to operate as a bargain and sale, but which was void for want of a pecuniary consideration, has been held to operate as a confirmation.

33. A father by indenture, in consideration of the love he bore his son, bargained, sold, gave, granted, and confirmed certain lands to him and his heirs. The deed was enrolled; and the question was, whether the lands should pass. It was held they should not, unless money had been paid, or estate were executed; for the use should not pass: but because the son was then in possession, it was held to enure by way of confirmation. Osborn v. Churchman, Cro. Ja. 127.

34. So where a conveyance was void as a lease and release, because the releasor had only a term for years in the land, it was resolved that it should operate as a grant and assignment.

35. A person possessed of lands for a term of 999 years, by lease and release, for a valuable consideration, granted, bargained, sold, and demised them to trustees and their heirs, to the use of himself and his wife for their lives, remainder to the heirs of the wife; and covenanted that he was seised in fee. It was argued, that nothing passed by this conveyance; for it being only a term in gross, no use passed to the trustees by the statute 27 Hen. VIII., which only raises a use out of a freehold: that no use passed by the lease for a year, or bargain and sale, and therefore the release could not operate by way of enlargement. But the Chancellor was of opinion, that Marshall v. Franks, Gilb. R. 143.

Doe v. Williams, infra.

although the conveyance was void as a lease and release; yet, the husband being in possession, and the word *grant* being inserted in the release, it should take effect as a grant or assignment of his whole interest at common law.

ante, c. 4. § 45.

36. A release will be construed to operate as a grant of a reversion, in order to effectuate the intention of the parties.

Goodtitle v. Bailey, Cowp. 597.

37. Robert Edwards being entitled to a reversion in fee, expectant on an estate for life, by deed of release, renounced, remised, released, and for ever quit-claimed all the said premises to A., and the heirs male of his body; and all his right, title, and interest therein. It was contended, that nothing passed by the release in this case, for want of proper operative words. There were appropriated terms to every conveyance; and where the word *grant* was used, being *genus generalissimum*, if the instrument could not take effect according to its proper form, it should operate in some other, if by law it could. But here the words were, renounce, release, and quit-claim; which were the special form of words adapted to a release only: therefore it could not operate as a grant. 1 Inst. 301 *b.* "A release, confirmation, or surrender, &c. cannot amount to a grant." In the case of Roe v. Tranmer, the word *grant* was used; and so it was in the cases there cited: but here there was no such word, nor any thing equivalent to it; consequently, nothing passed by the deed. Lord Mansfield said, the rules laid down in respect of the construction of deeds, were founded in law, reason, and common sense; that they should operate according to the intention of the parties, if by law they might; and if they could not operate in one form, they should operate in that which by law would effectuate

ante, ch. 10. § 5.

the intention. But an objection was made in this case, which, it was said, took it out of the general rule, and the doctrine of the authority cited: that was, that in the release in question, the word grant was not made use of. But that the intention of the parties was to pass all the right and title of the plaintiff in the premises, was manifest beyond a doubt.

Mr. Justice Aston observed, that this was the common wording of a releasee; but though in the shape of a release, if there were sufficient words, it might operate as a grant.

Vide Chester v. Willan, Eustace v. Scawen, Tit. 18. c. 2. § 27, 28.

Judgement was given upon another point.

38. Where a deed of bargain and sale is not enrolled, relief may notwithstanding be had in equity upon it, as an agreement to convey: an obligation arising upon it from the payment of the money. It may also be good as a grant of the reversion, if the lands are in the occupation of tenants.

11 Ves. 625.

ante, c. 4. § 45.

39. All modern deeds contain, in the granting part, a great number of the most operative technical words. Thus, in a release, the words, grant, bargain, sell, release, and confirm, are always used: because, if the conveyance should not happen to be good as a release, it may operate as a grant, a bargain and sale, or a confirmation.

40. Where a deed may enure in different ways, the person to whom it is made shall have his election which way to take it. Thus, if a deed be made by the words *dedi et concessi*; this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender. And it is in the choice of the grantee to plead or use it the one way or the other.

Where the Grantee has an Election how to take. Touch. 83.

41. Sir R. Heyward, being seised in fee of the manor of D. &c., and of divers lands and tenements, whereof part was in demesne, part in lease for years,

Heyward's Case, 2 Rep. 35.

with rents reserved, and part in copyhold; by indenture, in consideration of a sum of money paid to him by R. W. and E. P., demised, granted, bargained, and sold, to the said R. W. &c., the said manors, lands, tenements, and the reversions and remainders of them, with all rents reserved on any demise; to hold to them and their assigns, presently after the decease of the said R. Heyward, for the term of 17 years; which indenture was enrolled. Afterwards the said Sir R. H., by another indenture, covenanted with T. F. and others, to stand seised of the premises to the use of himself and the heirs of his body; and no attornment was made under the first conveyance. The question was, whether the bargainees should have election to take by the bargain and sale *in toto*, notwithstanding their general entry; or whether the estate which passed as an interest at common law, should be preferred before the raising an use. It was resolved by Popham and Anderson, chief justices, and the whole Court of Wards, that R. W. and E. P. had election to take it, either by demise at the common law, or by bargain and sale: for where a person seised in fee, for money, demises, grants, bargains, and sells his lands for years, he who is owner of the land, by his express grant, gives election to the lessee to take it by the one way or the other; for he hath sole power to pass it by demise or bargain; and therefore the law will not make construction against such express grant: and namely, in this case, where it would tend to the prejudice of the lessees; for if the law should force them to take it by demise, then they would lose the rents reserved upon the leases for years. It was also resolved, that this right of election continued, notwithstanding the alteration of the estate by the second indenture, the death of the

lessor, and the Queen's right to the wardship of the heir. And that where an estate passes, and the donee or grantee has a right of election, such right descends to his heirs or executors. 1 Inst. 145 *a*.

42. A lease was made to A. for 20 years, rendering rent. A. entered; afterwards the lessor for money paid by B., demised, granted, and to farm let to B. the same land for four years from the date of the said indenture; and afterwards enfeoffed by deed the second lessee, before he had elected to take the lease by way of bargain and sale, or otherwise, and before any rent paid to him: and neither upon the deed of feoffment, nor after, did he declare what way he took the lease; nor had he any attornment from the first lessee: and therefore Jones, Just. was of opinion, that B. had election to take it by demise at common law, or by way of bargain and sale, executed by the stat. 27 Hen. VIII., according to Heyward's and Fox's case: but till election, he should take it as a lease at common law; and if there was no attornment, it was as a future interest: but if he had received the rent of the first lessee, this had been an election in law to take it by way of bargain and sale. Darrell v. Gunter, W. Jones, 206. 2 Roll. Ab. 787. pl. 7. ante.

43. It is laid down by Jenkins, 166, that against a consideration alleged in a deed, or an use declared, no averment to the contrary can be received. So of indentures upon fines and recoveries, where the fines and recoveries pursue them. *Nihil est tam naturale quam quilibet dissolvi, eo modo quo ligatur.* Contract by contract; deed by deed; record by record; parliament by parliament. And since the statute of frauds, by which all contracts for lands must be in writing, no averment founded on parol evidence, which tends to contradict or vary a written agreement is, in general, admissible. No Averments admitted against Deeds.

Meres v. Ansell, 3 Wils. R. 275.

44. Upon a motion for a new trial, the facts were, that an agreement in writing was entered into, by which it was stipulated that the grass and vesture of hay, of a close called Boreham Meadow, was to be taken by one Ansell. The subscribing witness to the agreement deposed, that when the written agreement was made, it was also agreed by the parties by parol, that Ansell should not only have the hay of Boreham Meadow, but also the whole possession and soil thereof, and of another close called Millcroft. Lord Mansfield admitted this evidence; but the Court of Common Pleas said,—" We are all clearly of opinion, that no parol evidence is admissible to disannul, and substantially to vary, a written agreement. The parol evidence in the present case totally annuls, and substantially alters and impugns, the written agreement."

Preston v. Merceau, 2 Black. R. 1249.

45. An action on the case was brought for the use and occupation of a house, of which, it was agreed in writing, that a lease should be let by Christiana Preston to Abraham Gamage, for 21 years, at 26 *l.* *per annum.* Gamage died, and made Merceau his executor, who paid into court 26 *l.* for one year's rent. On the trial the plaintiff offered to show by parol evidence, that besides the 26 *l.* *per annum*, the defendant had agreed to pay 2 *l.* 12 *s.* 6*d.* a year, being the ground-rent of the premises, to the ground landlord; but no evidence was offered of the actual payment of such ground-rent during the testator's life; without which, Ld. Ch. Just. de Grey thought such parol evidence inadmissible, and nonsuited the plaintiff. Upon a motion to set aside the nonsuit, Mr. Justice Blackstone declared his opinion that it was right to reject this evidence. That courts should

be very cautious in admitting any evidence to supply or explain written agreements, else the statute of frauds would be eluded, and the same uncertainty introduced, by suppletory or explanatory evidence, which that statute had suppressed in respect to the principal object. It never ought to be suffered so as to contradict or explain away an explicit agreement; for that was in effect to vary it, Here was a positive agreement that the tenant should pay 26*l.* Should the court admit proof that this meant 28*l.* 12*s.* 6*d.*? What was it to the tenant to whom the rent was to be paid, so as he was obliged to pay more than his contract expressed. The court could neither alter the rent, nor the term.

46. The same doctrine is established in equity; for Lord Hardwicke has said, that to add any thing to an agreement in writing, by admitting parol evidence, which would affect land, was not only contrary to the statute of frauds, but to the rule of the common law, before that statute was in being; and it has been laid down by the Court of Exchequer, that where there is an agreement in writing executed, no evidence can be given to supply any defect in it, which was intended to be part of it, but not inserted; for that would be to evade the statute of frauds, and introduce more perjury.

2 Atk. 384. Treat. of Eq. B. 1. c. 3. § 11. Tinney v. Tinney, Tit. 7. c. 1. § 19

Binstead v. Coleman, Bunb. 65.

47. There are, however, some cases in which averments, founded on parol evidence, of collateral facts, tending to support or explain a deed, have been admitted. Thus, in the case of a bargain and sale to uses, an averment, that a pecuniary consideration was given, might have been made before the statute of frauds, and is still allowed; because such an averment stands with the deed.

But admitted in support of them.

5 Rep. 68 *b.*

ante, c. 9. § 23.

1 Rep. 176 *a.*

2 Roll. Ab. 786. N. pl. 1, Bedell's Case.

ante, c. 10. § 17.

ante, § 45.

48. In the case of Preston v. Merceau, Sir W. Blackstone observed, that with respect to collateral matters, parol evidence might be admissible: the plaintiff might show who was to put the house in repair, or the like, concerning which nothing was said; but he could not by parol evidence shorten the term to fourteen, or extend it to twenty-five years; or make the rent other than 26*l.* a year.

The King v. Scammenden, 4 Term R. 474.

49. In a modern case, the consideration expressed in a deed of conveyance was 28*l.*, but parol evidence was admitted to prove that 30*l.* was the real consideration; and Lord Kenyon said, it was clear that the party might prove other considerations than those expressed in the deed; it was permitted in all cases of covenants to stand seised to uses.

The King v. Laindon, 8 Term R. 379.

50. In a subsequent case, parol evidence was received, to prove that a sum of money was paid as an apprentice fee; though no mention of that circumstance was made in the contract of apprenticeship: and Lord Kenyon observed, that this parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact, and therefore it was properly received in evidence.

And where there is an Ambiguity.

51. In the case of an *ambiguitas patens*, that is, an ambiguity which appears upon the face of the instrument, no averment is allowed; but in the case of an *ambiguitas latens*, an averment supported by parol evidence is admissible. Hence Lord Bacon's maxim, 23. *Ambiguitas verborum latens verificatione suppletur: nam quod ex facto oritur ambiguum, verificatione facti tollitur.* Thus if a feoffment be made of the manor of S., and the feoffor has a manor called North S., and another called South S., parol evidence will be admitted to show which manor was meant.

Harding v. Suffolk, 1 Rep. in Cha. 74.

52. This doctrine is not altered by the statute of frauds; it being now held that parol evidence is admissible in all cases of latent ambiguities. And in the case of Meres v Ansell, the Court of Common Pleas said, that in some cases of deeds, where there were two Johns named, or two black acres mentioned, parol evidence might be admitted to explain which John, or which black acre, was meant. ante, § 44.

53. In a modern case Lord Thurlow said—"If there be a latent ambiguity, it must be explained by parol evidence; for though the words do not *prima facie* import an ambiguity, yet if such ambiguity can be made to appear from parol evidence, it must be admitted to explain it, as well as to raise it: but if words have in themselves a positive precise sense, I have no idea of its being possible to change them; and I take it to be an established rule that words cannot be changed in that manner." 1 Bro. R. 338.

54. Where it is alleged in a court of equity that a material part of an agreement has been omitted by fraud; or that the intention of the parties has been mistaken, and misapprehended by the drawer of the deed; parol evidence will be admitted to prove such fraud or mistake. And where there is Fraud or Mistake. Treat. of Eq. B. 1. c. 3. § 11.

55. It is a rule of law that a person shall always be estopped by his own deed; that is, he shall not be allowed to aver anything in contradiction to what he has once so solemnly and deliberately avowed. Where a Deed operates as an Estoppel. 1 Inst. 352 *a.*

56. Thus if a person makes a lease for years, by indenture, of lands wherein he has nothing at the time, and after purchases those lands, the lease will be good: because the lessor is estopped to say he did not demise them. If however such a lease be made by deed-poll, the lessee will not be estopped from averring that the lessor had nothing in the land at the 1 Inst. 47 *b.* Plowd. 434.

time of the lease made; because the deed-poll is only the deed of the lessor; whereas the indenture is the deed of both.

Idem. 57. When an interest actually passes by a lease, there is no estoppel; though the interest purported to be granted be really greater than the lessor, at that time, had power to grant. As if A., lessee for the life of B., makes a lease for years by indenture, and afterwards purchases the reversion in fee, and then B. dies; A. shall avoid his own lease, though the years expressed in the lease be not expired.

Iseham v. Morrice, Cro. Car. 109.

1 Inst. 45 *a*. 58. If A. seised of 10 acres, and B. of other 10 acres, join in a lease for years, by indenture, these are several leases, according to their several estates, and no estoppel is wrought by the indenture to either party; because each has an estate whereout such lease for years may be derived. For the reason why estoppels were at any time allowed was, because otherwise, when the party had nothing in the lands, the deed must be absolutely void.

1 Inst. 352 *a*. 59. Every estoppel ought to be reciprocal; that is, to bind both parties. This is the reason that regularly a stranger shall neither take advantage, nor be bound by an estoppel. Privies in blood, as the heir; privies in estate, as the feoffee, lessee, &c.; privies in law, as lord by escheat, tenant by the curtesy, tenants in dower, and others that come in by act of law, or in the *post*; shall be bound, and take advantage of estoppels.

Skipwith v. Green, 1 Stra. 610. Fairtitle v. Gilbert, 2 Term R. 169. 60. A lessee is not estopped by the description of the lands contained in his lease, for this is not the essence of the deed: he may therefore show that what is there called meadow, has been sometimes ploughed.

Construction of Conveyances to Uses. 61. It was formerly held, that conveyances to uses should be construed like wills; that is, according to

the intention of the parties, though not expressed in the proper, legal, and technical words, required in conveyances deriving their effect from the common law. This doctrine is partly denied by Lord Hardwicke, who, in a case where the question was, whether, in a covenant to stand seised, the words were to be construed strictly, said—" It is objected that there is no warrant to construe a deed to uses, as to the limitations and words of it, in a greater latitude than a conveyance at common law; and if construed in a different manner, would cause great confusion; which I hold to be true in general. For, the statute joining the estate and the use together, it becomes one entire conveyance, by force of the statute; and the words are to be construed the same way: but this is to be taken with some restriction. As to the words of limitation in a deed, they are, to be sure, to be construed in that manner, viz. in the same sense: but where they are words of regulation or modification of the estate, and not words of limitation, I think there is no harm in giving them greater latitude in deeds on the statute of uses, which are trusts at common law; than in feoffments, which are strict conveyances at common law."

Carter v. Ringstead, Cro. Eliz. 208.
Leigh v. Brace, Carth. 343.
Rigden v. Vallier, 2 Ves. 252. 3 Atk. 734.

62. If it should be established that conveyances to uses, which are now become the common assurances of the realm, were to be construed in the same manner as wills, even with respect only to the words of regulation, or modification of the estate; such a doctrine would, in some degree, tend to introduce all that latitude and uncertainty which now prevails in the construction of testamentary dispositions. Of this opinion was the late Mr. Booth, the most able conveyancer of the last century; who says, in one of his opinions, " If deeds of uses must be governed by

Cases and Opinions, v. 2. 279.

the same rules as prevail with respect to wills, that a limitation to a man's male descendants, or male children, may create an estate in tail; and an absolute inheritance may pass by a limitation to the use of the grantee for ever; which will produce infinite confusion."

Willes Rep. 189.

63. Mr. Booth's opinion is confirmed by Lord C. J. Willes and his brethren, in the case of Tapner v. Marlott; where he says—"As to what was insisted upon, that a conveyance to uses is to be construed as a will, and in a different manner from other conveyances, we are all clearly of a contrary opinion. For since the statute of uses, an use is turned into a legal estate, to all intents and purposes; it must be conveyed exactly in the same manner, and by the same words: and if it were otherwise, as most conveyances are now made by way of use, endless confusion would ensue.

2 Bro. R. 233. 3 Term R. 765. 8 Term. R. 519.

64. Lord Thurlow and Lord Kenyon have fully assented to this doctrine. Therefore it may now be laid down as settled, that conveyances to uses are to be construed in the same manner as deeds deriving their effect from common law.

Of Declarations of Trust. Fearne Cont. Rem. 218. 4th ed.

65. Declarations of trust are construed in the same manner as common law conveyances, where an estate is finally limited by a deed, without any kind of reference to a further execution of the trust, by a conveyance directed to be made. For in such cases any occasional conveyance that may at any time be required of the legal estate from the trustees, may well be deemed a matter of form only; and not otherwise requisite than for the mere purpose of investing the subsisting trusts, whatever they may be, with their commensurate legal estates.

66. But a declaration of trust, whose effect is referred to another conveyance, directed to be made for its establishment, which was formerly called an executory trust, may reasonably be considered as left to some degree of modification, by that supplemental part of the deed, viz. the conveyance to which the completion of the trusts is referred. And such conveyance may be directed to be made, so as to effectuate the intention of the person creating the trust, with less regard to the strict rules of construction, than in a case of a trust executed. Idem. 1 Atk. 608. 1 Ves. 103.

67. Articles of agreement being only considered as preparatory to something which is to be completed afterwards, the construction of them is different from that of regular conveyances: it being a rule to look on them merely as the heads of what has been agreed upon between the parties, and only as minutes drawn up by them, to lay before counsel, in order to direct and guide them to carry the intent and scheme of the parties into execution. Therefore the Court of Chancery will mould them in such a manner, as to comprehend what appears to be the manifest intent and design of the parties, without paying a nice attention to the legal sense or operation of the words which may be made use of in framing the articles. Of Articles of Agreement. 2 Atk. 545. Collect. Jur. vol. 2. 374.

68. This doctrine is particularly applicable to articles of agreement made previous to marriage. And where a covenant to convey property at a future time is inserted in a marriage settlement, it will be construed in the same manner as an article of agreement. infra, 22. Lincoln v. Newcastle, infra, c. 23.

TITLE XXXII.

DEED.

CHAP. XX.

Construction of the formal Parts of a Deed.

2. *Date.*
7. *Parties.*
10. *How to be described.*
23. *Recital.*
29. *Consideration.*
30. *Grant or Release.*
34. *Description of the Things granted.*
53. *Effect of Additions to the Description.*
62. *Clause respecting Deeds.*
64. *Exception.*
66. *Habendum.*
74. *Void when repugnant to the Premises.*
79. *But may abridge or qualify and enlarge them.*
85. *Sometimes not controlled by the Premises.*
88. *Words of Limitation and Purchase.*

SECTION 1.

HAVING stated the general rules and principles established for the construction of deeds, I shall proceed to the exposition of the formal parts of a deed; in the order in which they have been mentioned.

2. With respect to the date of a deed, which is the description of the time when it was made, by inserting the day of the month, the year of the King, and the year of our Lord; it may be placed either at the beginning or the end. In deeds indented, it is now usually placed at the beginning; and in deeds poll, at the end.

3. In former times deeds were not dated, because the limitation of prescription, or time of memory,

often changed; and then it was held for law, that a deed bearing date before the limited time of prescription, was not pleadable. But it became customary, about the time of Edward II., to insert the date in all deeds, which has been practised ever since. Tit. 31. c. 2.

4. It is not, however, absolutely necessary that a deed should be dated; for, as has been already stated, if a deed has no date, or bears an impossible date, it will take effect from the time of its delivery. c. 2. § 80.

5. Deeds take place according to the priority of their dates, or times of delivery; it being a maxim of the common law, *qui prior est tempore, potior est in jure.* But it has been shown that there are many cases where a purchaser or mortgagee may, by obtaining an assignment of a prior legal estate, obtain a preference over a person claiming under a prior deed: and in consequence of the register acts, a deed duly registered will take place of a prior deed not registered. Tit 12. c. 3. § 33. Tit 15. c. 5. § 27. infra, c. 28.

6. Where two deeds bear the same date, and manifestly contain but one agreement, that deed shall be presumed to be first executed, which will best support the clear intention of the parties. Taylor v. Horde, 1 Burr. 106.

7. With respect to the parties to a deed, they are either active or passive. Those who grant, demise, or release, are the active parties, and are called the grantors, lessors, and releasors; those to whom lands are granted, demised, or released, are the passive parties, and called the grantees, lessees, or releasees. Parties.

8. If several persons join in a deed, some of whom are capable of conveying or taking, and others incapable, it shall enure and be construed as the deed of those only who are capable of conveying, and to those only who are capable of taking; for the incapacity 1 Inst. 45 *a.* Touch. 81.

of some of the parties will not render it invalid, as to those who are capable.

1 Rep. 76 *a.* 6 — 14 *b.*

9. Although a tenant for life can only grant away his own life estate, yet if he is joined in the deed by the remainder-man or reversioner, they may together convey the inheritance; for each passes his own estate.

How to be described.

10. The parties to a deed ought to be described by their proper christian and sirnames, their rank, profession, and place of residence. But mistakes in the description of the parties will not, unless very gross, make a deed void; for if the description, however imperfect, is sufficient to distinguish the person described from all others, it will be good.—*Nihil constat error nominis, cum de corpore constat.*

11. Persons who have several christian names, as Thomas Henry, &c., frequently use only the first name: and in that case, if they are described in a deed by the first name only, it will be good. For

188 *b.*

this, there is an authority in Bracton, who, speaking of legal proceedings, in which the description of the parties should be particularly accurate, says—*Si quis binominis fuerit, sive in nomine proprio, sive in cognomine, illud nomen tenendum erit, quo solet frequentius appellari.*

I Inst. 3 *a.*

12. If lands be granted to Robert Earl of Pembroke, when his name is Henry; or to George Bishop of Norwich, when his name is John; it will be good. For in these and the like cases, no doubt or uncertainty can arise; as there can be but one person having those dignities.

Carth. 440.

13. It is said by Lord Holt, that a grant to a duke's eldest son, by the name of marquis; or to the eldest son of a marquis by the name of earl,

et sic de similibus; would be good: because of the common curtesy of England; and their places in heraldry.

14. A wife is a good name of purchase, without a christian name; and so it is if a christian name be added, and mistaken; for *utile per inutile non vitiatur.* But if an ordinary person grants by his sirname only, without any name of baptism; or by his name of baptism, without any sirname; in these and the like cases, the deed will be void for uncertainty: unless there be some other matter in the deed to help it; or something done after to supply the defect. 1 Inst. 3 *a.*

15. A name acquired by reputation only, will be considered as a sufficient description; for all sirnames were originally acquired by reputation. Hence it has been often held, that a bastard is sufficiently described by the name by which he has been usually known. Idem.

16. A person to whom an estate in remainder is limited, may be described in a deed, without mentioning either his christian or sirname; as if a remainder is limited, *primogenito filio*, or *seniori puero*, of J. S., it will be good. And in the usual limitation of remainders to persons unborn, they are necessarily described in this manner. Idem.

17. The word issue is a good description in a deed, and is equivalent to the words child or children: therefore a remainder to the issue, or issue of the body of A., is good. Idem.

18. In consequence of the maxim, that *nemo est hæres viventis*, an immediate grant to the heirs of A. is void. But a remainder may be limited to the heirs of A.; which will be good, in case A. dies during the continuance of the particular estate, or at the instant of its determination. And a grant to the heirs of a Tit. 16. c. 1. § 25.

person who is dead, is good; for in that case the word heirs is a sufficient description of the person intended to take.

2 Roll. Ab. 417. pl. 6.

19. A limitation in remainder to the right heirs of A. and B., will give such heirs, if their parents die during the particular estate, an estate in common. But a limitation to the heirs of husband and wife will be considered as a limitation to the heirs of them both, according to that relation; that is, to the children of both.

Roe v. Quartley, 1 Term R. 630.

Waker v. Snow, infra, c. 22.

20. The word heir, in the singular number, is a sufficient description, by which an estate may be limited.

1 Inst. 24 *b.* n. 3.

21. Lord Coke says, if a remainder is limited to the heirs female of the body of A., and A. dies leaving a son and a daughter, the daughter can take nothing by this limitation, because she is not heir: for the person claiming under such a description must fully answer it; and consequently, a person having only half the description will be excluded. Now the description consists of two parts; one requiring that the donee should be heir; the other, that the donee should be a female: and in the case put by Lord Coke, the daughter is not heir, she having a brother. This doctrine has been controverted; it is, however, very ably defended by Mr. Hargrave in his note to this passage. But in a subsequent note he has mentioned a case in which the Court of Exchequer refused to apply the rule to a marriage settlement: and held, that a limitation to the heirs female of the body of the settlor was good, though the person answering that description was not also heir general.

Beckford v. Pendarvis, 5 Bro. Parl. Ca. 93.

1 Inst. 164 *a.* n.

Goodtitle v. Burtenshaw, Fearne's Cont. Rem. 6th ed. App. No. 1.

22. In conveyances by or to corporations, the description of the corporation must be such as to distinguish it from all other corporations. But there

Fanshaw's Case, Moo. 235.

is no case where a grant by a corporation has been held void, on account of a variance in any of these four circumstances; namely, addition, interposition, omission, or commutation; if they retain the four first principles of substance, viz. name of persons, of house, foundations, or dedications, places known before the foundation, in which the house is situated.

Recital.

23. The recital is a narrative of such facts, deeds, or agreements, as are necessary to explain the grantor's title, and the motives and reasons upon which the deed is founded. Although recitals are not absolutely necessary, yet they are now usually inserted in all deeds, for the purpose of showing the origin and derivation of the title, or of stating such facts as are connected with, or relate to, the subject-matter of the deed.

Withes v. Casón, Hob. 128. Lewen v. Moody, 3 Leon. 135. Cro. Ja. 127. Jennan v. Orchard, Skin. 543.

24. A mis-recital of a former grant will not invalidate a deed. As where a person made a lease, *habendum* from the feast of the Purification: afterwards reciting the lease as granted from the feast of the Annunciation, he granted the reversion: it was held good. In a subsequent case it was held, that a mis-recital of the estate of the grantor in the land, or of the date of the deed by which he acquired the land, did not invalidate a deed.

1 Inst. 352 *b*.

25. It is laid down by Lord Coke, that a recital does not conclude, because it is no direct affirmation. But it has been since held, that though a person shall not be estopped by a general recital; yet he may be estopped by the recital of a particular fact.

Shelley v. Wright, Willes R. 9.

26. Thus where it was recited in the condition of a bond, that the obligor had received divers sums of money for the obligee, which he had not brought to account, but acknowledged that a balance was due to the obligee. It was held, that the obligor was

estopped to say that he had not received any money for the use of the obligee.

Ford v. Grey, 6 Mod. 45. ante, c. 11. § 8.

27. Where it can be proved, that a deed was actually executed, and is lost, the recital of it in another deed is evidence of it.

Consideration.

28. After the recitals comes the witnessing part, which begins with an account of the consideration; and if it be a pecuniary one, the payment of it is mentioned, and the grantor acknowledges the receipt of it, and releases the grantee from the payment of it. And it is also usual to indorse a receipt for the consideration, where it is pecuniary, on the back of the deed, which should be signed by the party who receives the money.

2 Atk. 478. 3—112.

Grant or Release.

29. The next thing is the grant or release by which the lands are transferred. The technical words, where necessary, by which this transfer is made, differ according to the different kinds of conveyance, and have been already stated.

30. It should however be observed, that some difference of opinion has existed respecting the necessity of the word *grant*. Sir J. Palmer thought, that in a deed to pass an inheritance, where there was a common in gross, the word *grant* was absolutely necessary; for it could not pass by the livery: from which it was supposed that incorporeal hereditaments, severed from the inheritance, could only pass by the word *grant*. This must however be confined to feoffments; for in conveyances derived from the statute of uses, advowsons, commons, and all other incorporeal hereditaments, may be conveyed without the word *grant*.

Bridgeman's Conveyan. vol. 1. 323.

ante, c. 9. § 19.

Touch. 89.

31. When any thing is granted, all the means to attain it, and all the fruits and effects of it, are also granted, and will pass *inclusivè*, together with the

thing itself, without the words *cum pertinentiis*: for it is a maxim, *caicunque aliquid conceditur, etiam et id sine quo res ipsa non esse potuit.*

32. Thus if a person grants a piece of ground in the middle of his estate; he at the same time impliedly grants a way to it, and the grantee may pass over the land of the grantor for that purpose, without being guilty of a trespass. Fitz. N. B. 183. Tit. 24. § 11.

33. The grant or release is immediately followed by the description of the things granted, which cannot be too minute and accurate. Every thing intended to be conveyed should be particularly mentioned, and set down in its proper order; such as manors, messuages, farms, lands, tenements, and hereditaments; all which should be described by their situation, county, hundred, tithing or vill, hamlet and parish, number of acres, and boundaries, and in whose tenure and occupation. Description of the things granted.

34. Originally the kingdom, in reference to civil matters, was divided into counties, hundreds and vills, tithings, or townships: for parishes were divisions only in reference to ecclesiastical affairs, of which the common law took no notice; but in process of time parishes became divisions allowed in reference to civil matters. 1 Freem. 228. 1 Comm. 115.

35. There was a parish and also a vill called Street, and a person having lands in the vill of Street, and also lands in the parish of Street, but not within the vill of Street, conveyed all his lands in Street. It was resolved that the lands in the vill only passed; because when Street was named generally, it must be understood of the vill only. Stoke v. Pope, 2 Roll. Ab. 54.

36. The word manor has a very extensive signification; for it will pass, 1st. All the demesnes; that is, all the lands whereof the lord is seised within the manor; and also the freehold of all lands held by 1 Inst. 5 a.

copyholders or other customary tenants, together with all the wastes. 2d. All the services, such as fealty, suit of court, rents, &c. 3d. All courts baron, courts leet, with the fines and perquisites annexed thereto, and all other franchises that are parcel of, or appendant to the manor at the time of the conveyance. The site and demesnes of the manor may however be separated in a lease from the manor itself.

Tanfield v. Rogers, Tit. 28. c. 1. § 29.

Touch. 92.

37. An advowson appendant to a manor will pass by a conveyance of the manor, even though the word appurtenants be omitted; because it is parcel of the manor: but things which are not parcel of the manor will not pass by a conveyance of the manor; unless they have gotten from time immemorial a reputation of appendancy.

38. Lands held in fee simple of a manor, are not considered as parcel of the manor, although the rents and services issuing out of such lands are parcel of a manor. But where lands which originally constituted part of the demesnes of a manor are granted out for life or in tail, the reversion remains parcel of the manor, and will pass by a conveyance of the manor; for, as Mr. Pigot observes, when a person is seised of a manor and demesnes in possession, and makes a lease for life, and parts with the possession of what he so leases; in lieu of the possession, he has the reversion and services, which are annexed to the manor, and constitute a part of it; and the reversion and services naturally follow the right and nature of the land.

1 Inst. 324 *b*.

Recov. 42.

Acton's Case, Dyer, 288. Cro. Eliz. 792.

39. A court baron being incident to a manor of common right, the manor cannot be granted by a private person, with an exception of the court baron and its perquisites; but may be so granted by the King.

40. It has been stated, that although many manors have been destroyed, yet they still continue to be called manors, though in fact they are only reputed manors; and a reputed manor will pass in a conveyance by the word manor. Dissert. c. 3. § 49. Finch's Case, 6 Rep. 66.

41. The word hundred will only pass the franchise, not the lands lying within the hundred. Bays v. Bird, 2 P. Wms. 397.

42. The word messuage is synonimous with dwelling house; and a grant of a messuage with the appurtenances will not only pass a house, but all buildings attached or adjoining to it; as also its curtilage, garden, and orchard; together with the close in which the house is built. But if a greater quantity of land has been usually occupied with the house, yet it will not pass. 1 Inst. 5 *b.* Smith v. Martin, 2 Saund. 400.

43. The word farm comprehends many things; for by the conveyance of a farm will pass a messuage, arable land, meadow, pasture, wood, &c., thereto belonging, or therewith used; because this word properly signifies a messuage, with a quantity of demesnes thereto belonging. 1 Inst. 5 *a.* Touch. 93.

44. The word land, strictly taken, only signifies arable land. For in the ancient *præcipes* we constantly find the words, *terra, pratum, et pastura*; land, meadow, and pasture. But this confined meaning of the word land was only adopted when used in a *præcipe*, in an adversary suit; for Lord Coke says land, in the legal signification, comprehends any ground, soil, or earth whatever, as meadows, pastures, woods, moors, waters, marshes, furzes, heaths; and that it also includes all castles, houses, and other buildings thereon; which will pass with it. 1 Inst. 4 *a.*

45. Land is often described according to its admeasurement; and in that case the acres shall be taken according to the estimation of the country in Some v. Taylor, Cro. Eliz. 665.

which it lies; not according to the statute *de terris mensurandis*. But where a person has a close containing 20 acres of land by estimation, but which in reality is not 18, and he grants 10 acres of that close to another, the grantee shall have them according to statute measure; because those acres were not known by parcels, or by metes and bounds.

Morgan v. Tadcastle, Poph. 55.

1 Inst. 48 b. 46. Where a person has a moveable estate of inheritance in 13 acres of land, parcel of a meadow of 80 acres, he may convey it by the description of 13 acres, lying within the meadow of 80 acres, without bounding or describing it in certainty.

1 Inst. 4 b. 47. If a person grants to another the profit of certain lands, and makes livery of seisin *secundum formam chartæ*, the land itself will pass, together with the vesture, herbage, trees, mines: for what is the land but the profits thereof.

Idem. 48. If a man seised of several acres of wood, grants to another *omnes boscos suos*, all his woods; not only the woods growing upon the land pass, but the land itself; for *boscos* not only includes the trees, but also the land whereupon they grow.

Idem. 49. If a man grants all his pastures, the land employed in the feeding of beasts will pass; as also such pastures and feedings as the grantor has in another man's soil. And if a person grants *omnia prata sua*, all his meadows, the land itself of that kind will pass.

Id. n. 1. 50. Lord Coke says, a grant of *vesturam terræ* will not pass the soil; but only the corn, grass, and underwood. This has been doubted; and it has been contended, that the words *vesture of lands*, means all the profits.

d. 5 b. 51. Where a person has a forest, park, chase, vivary, and warren, in his own ground, and grants them away; not only the privilege and franchise,

but the land itself passes; for they are compound.

52. If a person grants *aquam suam*, the soil will not pass; but only the right of fishing in that water: for the proper words, in that case, to pass the soil, would be, so many acres of land *aqua coopertas*, covered with water. But the word *stagnum*, or pool, will pass both the water and the land. Id. 4 *b.*

53. It has been stated, that tithes will not pass under the denomination of land; and that a release of all claims arising out of lands would not affect them; so that they can only be conveyed by the word tithes. Tit. 22. § 3.

54. The word tenement is of greater extent than any that has been mentioned: for though in its usual acceptation it is only applied to houses and other buildings; yet in its original, proper, and legal sense, it signifies every thing that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus, the words *liberum tenementum*, or frank tenement, are applicable, not only to land, but also to rents, commons, offices, and the like. 1 Inst. 6 *a.*

55. The word hereditament is much the largest and most comprehensive one used in deeds; for it includes not only lands and tenements, but also whatever may be inherited; be it corporeal or incorporeal, real, personal, or mixed. Thus, an heir-loom, or piece of furniture, which by custom descends to the heir, together with a house, is neither land nor tenement, but a mere moveable; yet being inheritable, it is comprised under the general word hereditament. And so a condition, the benefit of which may descend to a person from his ancestor, is also an hereditament. 1 Inst. 6 *a.* Fearne Posthum. 8. 3 Atk. 82.

Tit. 1. § 3. Doe v. Burt, 1 Term R. 701.

56. Notwithstanding the maxim *cujus est solum*, &c., a lease of a yard will not pass a cellar, situated under that yard; if it can be shown by evidence that the cellar was not intended to be demised.

The words, all lands and meadows to the said messuage or mill belonging, or used, occupied, or enjoyed, or deemed, taken, or accepted as part thereof, inserted in a release, have been held to pass leasehold, as well as freehold lands.

Doe v. Williams, 1 H. Black. 25.

57. In consequence of the maxim, *id certum est quod certum reddi potest*, lands will pass in a deed by the words,—all that the estate in the tenure of J. S., or all that estate which descended to the grantor from J. S., or all the grantor's lands in the county of B. And it is very common, after a particular description of the estates intended to be granted, to insert the words; and all other the messuages, &c. of the said A. B. in the county of C.

Touch. 250.

Effect of Additions to the Description. Bac. Tra. 102.

58. Lord Bacon says, *veritas nominis tollit errorem demonstrationis.* And therefore, if lands are described, in the first instance, by their proper name; as the manor of Dale; or by their abuttals, as a close of pasture bounded on the east by Endsdenwood, on the south by, &c.; or if the general boundary is mentioned, and the grantor has no other lands in the same precinct; or if the lands are described by their appendancy to other lands more notorious, as parcel of the manor of A.; in all these cases, if there be an error in any addition made to these names or descriptions, it will have no effect.

Id. 105.

59. Thus, if a person grants his close called Dale, in the parish of Hurst, in the county of Hants, and the parish extends into the county of Berks, and the whole close of Dale lies in the county of Berks; yet,

because the parcel is especially named, the falsity of the addition hurteth not. Windham v. Windham, Dyer, 376.

60. In a case reported by Plowden, where a lease was made of all that the farm of Brosley, then in the tenure and occupation of R. Wilcox; which was not the fact; the Court said, that the word farm had a certainty in itself: and when the description went farther, and said, in the tenure and occupation of R. Wilcox, this was of no effect; for if it was not in his tenure and occupation, yet it should pass: because there was a certainty in the thing demised, viz. the farm of Brosley; and so another certainty put to a thing which was certain enough before, was of no manner of effect. Wrottesley v. Adams, Plowd. 191.

61. But if there is an error in the principal description of the thing intended to be granted, though there be no error in the addition, nothing will pass. Thus, Lord Bacon says, if a person grants *tenementum suum*, or *omnia tenementa sua*, in the parish of St. B. without Aldgate, where in truth it is without Bishopsgate, *in tenura Gulielmi A.*, which is true, yet the grant will be void: because that which sounds in denomination is false, which is the more worthy; and that which sounds in addition is true, which is the less. And though the words, *in tenura Gulielmi A.*, which is true, had been first placed, yet it had been all one. Tra. 105. Dowtie's Case, 3 Rep. 9. Hob. 171.

62. Where words of addition are mistaken, and contrary to the real fact, they will not even operate as a restriction on the preceding words.

63. A corporation demised, in these words—all that their glebe land lying in Chesterton, viz. 78 acres of land, and also the demesnes of the said 78 acres, with all the tithes of the said parish of Chesterton, and also the tithes of the said 78 acres; all which lately were Swift v. Eyres, Cro. Car. 546.

in the occupation of Margaret Peto deceased. The tithes of the lands demised never were in the occupation of Margaret Peto; and the question was, whether they passed to the lessee. It was urged for the plaintiff that the words, in the occupation of M. Peto, were a clause of restriction, which showed an intent that nothing should pass but what was in her occupation. But all the Judges held the lease good, and no restriction of the first words, because there were three distinct clauses before. 1°. The grant of the 78 acres of glebe. 2°. The grant of the tithes. 3°. The grant of the tithes of the 78 acres of glebe: which were all distinct several clauses by themselves. And the clause, all which, &c., did not depend on any of them; for the words, "which were, &c." was a restriction only, when the clause was general, and was all but one and the same sentence; and not ended or certain before the end of the sentence. But where the clause was not in one entire sentence, but distinct and disjoined from the other, as here it was, there could not be any restriction. Also this being in the case of a common person, addition of a false thing; viz. false possession, shall never hurt the grant: for the addition of a falsity shall never hurt, where there is any manner of certainty before. Wherefore they all concluded that the grant was good; and observed, that though the words "which were in the tenure of M. P." when they are in one and the same sentence, may be construed to be a restriction; yet in these words, "all which were, &c." the word all, so disjoined, could not be a restriction, but an explanation.

64. Where the lands are first described generally, and afterwards a particular description is added, that shall restrain the general words. Thus if a man

grants all his lands in D. which he has by the gift and feoffment of J., S. nothing will pass but lands of the gift and feoffment of J. S. But if he had granted all his lands in D. called N., which was the estate of J. S., there the lands called N. shall pass though they never were the estate of J. S. Bro. Ab. Grants, 92.

65. The next clause usually inserted in the premises of a deed, where the fee simple is conveyed, is, "together with all deeds, evidences, and writings, &c." For although in general, deeds follow the land, and a purchaser in fee, without warranty, is entitled to them, though not particularly granted, yet it is not amiss to insert this clause. And in conveyances to uses, it ought never to be omitted, because in that case there is a doubt whether the deeds pass to the releasees to uses, or to the *cestui que use*. Clause respecting Deeds. 1 Rep. 1 *a*. 1 Inst. 6 *a*. n. 4.

66. In Lord Buckhurst's case it was resolved, that if a person made a feoffment with warranty, by which he was bound to render in value, there, without an express grant, the feoffee should not have the charters that comprehended warranty, upon which the feoffor might have his warranty paramount. 1 Rep. 1. infra, c. 24.

67. The next clause in the premises of a deed is that whereby the grantor excepts something out of that which he has before granted; by which means it does not pass by the grant, and is severed from the thing granted. Exception. Touch. 77.

68. The following circumstances are necessary to make a good exception. 1°. It must be made by apt words. 2°. The thing excepted must be part of the thing previously granted, and not of any other thing. 3°. It must only be a part of the thing granted; for if the exception extends to the whole, it will be void. 4°. It must be of such a thing as is severable from the thing granted; and not an inseparable Idem.

interest, or incident. 5°. It must be such a thing as that he who excepts may retain it. 6°. It must be of a particular thing out of a general one; not a particular thing out of a particular one. 7°. It must be certainly described and set down.

Habendum.

69. With respect to the *habendum*, its office is only to limit the certainty of the estate granted; therefore no person can take an immediate estate by the

2 Rep. 55 *a*.

habendum of a deed, where he is not named in the premises; for it is in the premises of a deed that the thing is really granted.

Brooks v. Brooks, 2 Roll. Ab. 67.

70. If land be given to J. S. *habendum*, to him and a stranger, for a certain estate; this is void as to the stranger, because he was not mentioned in the premises: and when J. S. dies, there will be no occupancy; for the grant to the stranger in the *habendum* was intended an estate to him, and not as a limitation of the estate of J. S.

Windsmore v. Hobart, ante, ch. 19. § 30.

71. There are, however, some exceptions to this rule. 1. If lands are given in frank marriage, the wife, who is the object of the gift, may take by the *habendum*, though not named in the premises. 2°. A person not named in the premises may take an estate in remainder by the *habendum*. 3°. If no name whatever be mentioned in the premises, then a person named in the *habendum* may take.

1 Inst. 21 *a*.

ante, c 2. § 3.

Touch. 75.

72. There is a case where the two Ch. Justices and the Ch. Baron certified to the Chancellor that a lease was good, though the lessee was only named in the *habendum*.

1 Inst. 7 *a*. *n*. 3.

73. In declarations of uses, a use may be declared in the *habendum* to a person to whom no estate is granted in the premises.

74. Sir T. B., by indenture between him and John and George Sammes, bargained, sold, and enfeoffed

Sammes Case, 13 Rep. 55.

to John Sammes, to hold to the said John and George Sammes, their heirs and assigns, to the use of them and their heirs for ever. Resolved, that although the feoffment was good only to John and his heirs, yet the use limited to John and George and their heirs, was good; because the seisin of John was sufficient to serve the use declared to George.

75. Nothing can be limited in the *habendum* of a deed, which has not been given in the premises; because the premises being the part of a deed in which the thing is granted, it follows that the *habendum*, which is only used for the purpose of limiting the certainty of the estate, cannot increase the gift; for in that case the grantee would in fact take a thing which was never given to him. 2 Roll. Ab. 65. Touch. 76.

76. Thus if a person grants a manor, *habendum una cum* another manor, or *una cum advocatione* of another manor, this is not good; because it was not included in the premises. But if a thing is comprehended in the premises, and has another name in the *habendum*, the *habendum* is good: as if the nomination of an advowson is granted, *habendum* the advowson, it is good, though it varies in name; for it is one and the same thing. 2 Roll. Ab. 65. Plowd. 157.

77. Where the *habendum* is repugnant and contrary to the premises, it is void, and the grantee will take the estate given in the premises. This is a consequence of the rule already stated, that deeds shall be construed most strongly against the grantor; therefore that he shall not be allowed to contradict or retract, by any subsequent part of the deed, the gift made in the premises. Void when repugnant to the Premises. c. 19. § 13. 1 Inst. 299 *a*. 8 Rep. 56 *b*.

78. Thus if lands are given in the premises of a deed to A. and his heirs, *habendum* to A. for life; the *habendum* is void; because it is utterly repugnant to, Plowd. 153.

and irreconcileable with the premises. So if the grant were to two persons, *habendum* to the one for life, remainder to the other for life, it would be void; because by the premises the grantees were joint tenants; so the *habendum* would sever the jointure, and make the one to have the whole during his life, and the other to have the whole after him.

2 Rep. 23 *b*. 79. In the case of things which derive their effect from the delivery of the deed, without other ceremony, and which lie in grant; there the *habendum*, if repugnant to the premises, is void: as if a man grants rent or common out of his land, in the premises of a deed, to one and his heirs, *habendum* to the grantee for years, or for life the *habendum* is repugnant and void; for an estate in fee passed in the premises, by the delivery of the deed.

80. But where a ceremony is requisite to the perfection of the estate limited by the premises; and nothing more than the mere delivery of the deed is required to the perfection of the estate limited by the *habendum*; there, although the *habendum* be of a lesser estate than is mentioned in the premises, if the ceremony is not performed, it shall stand.

Baldwin's Case, 2 Rep. 23. 81. A person by indenture covenanted, granted, and demised, and to farm let, certain lands to *A. B.* and *A.* her son, and to the heirs of the said *A.*; *habendum* to them from the date of the same indenture until the end of 99 years: no livery of seisin was made. It was resolved, that as livery of seisin was necessary to perfect the estate limited in fee, nothing would have passed but an estate at will, if the deed had not gone farther: but as an estate for years was limited in the *habendum*, that was good presently, by the delivery of the deed. And so it appeared to

have been the intention of the parties that the deed should take effect by the delivery.

82. There are, however, several cases where the *habendum* is allowed to abridge, or rather qualify the premises; for we have seen that where a deed first speaks in general words, and afterwards descends to special ones, if the special words agree with the general ones, the deed shall be intended according to the special words.

But may abridge or qualify and enlarge them. 8 Rep. 154 *b.* ante, c. 19. § 8.

83. Thus where no estate is limited in the premises, and an express estate for years is limited in the *habendum*, this will qualify and abridge the general intendment of the premises, by which an estate for life would otherwise have passed.

1 Inst 183 *a.* 2 Rep. 55 *a.*

84. If lands are given in the premises to A. and his heirs, *habendum* to him and the heirs of his body, he will only take an estate tail; because the *habendum* may qualify and restrain the general import of the word heirs.

8 Rep. 154 *b.* Thurman's Case, 1 Roll. Ab. 68.

85. Where lands were granted to A. and his heirs, *habendum* to him and his heirs for three lives; the *habendum* was construed so as to abridge the estate given in the premises, to an estate for three lives.

Pilsworth v. Pyett, T. Jones, 4.

86. If a lease be made to two persons, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* makes them tenants in common; whereas by the premises they were joint tenants.

1 Inst. 183 *b.* 190 *b.*

87. The estate given in the premises may be enlarged by the *habendum*; thus where an estate is given in the premises to the grantee for life, *habendum* to him and his heirs, the grantee will take an estate in fee.

1 Inst. 299 *a.*

88. Where the premises and the *habendum* of a deed are equally clear, the former will not be con-

Sometimes not controlled by the Premises.

trolled by the latter, but both will be allowed to have an operation; it being a rule, that a deed shall be construed in such a manner as that each part may be effectual, if they can stand together.

ante, c. 19. § 5.

8 Rep. 154 *b.* 1 Inst. 21 *a.*

89. Thus if lands are given in the premises to a person and the heirs of his body, *habendum* to him and his heirs, he will take an estate tail, with a fee simple expectant.

Turnman v. Cowper, Cro. Ja. 476.

90. Lands were given to husband and wife, and to their heirs, *habendum* to them and the heirs of their bodies. It was held that the grantees took an estate tail, with a fee simple expectant. Mr. Hargrave has observed, that this case was attended with circumstances particularly showing an intention to pass both: for there was a reservation of tenure to the lord paramount, which could not be, if only an estate tail passed to the donee, and the reversion had remained in the donor, for then the tenure must have been of the donor.

Tit. 2. c. 1. § 19.

Words of Limitation and Purchase.

91. The words inserted in the *habendum* for the purpose of showing the quantity of estate intended to be given, are called words of limitation; in contradistinction to the words in the premises by which the lands are given, and which are called words of purchase. Thus Mr. Fearne says—"In general, words of purchase are those by which, taken absolutely, without reference to or connection with any other words, the estate first attaches, or is considered as commencing in the person described by them: whilst words of limitation operate by reference to or connexion with other words, and extend or modify the estate given by those other words."

Cont. Rem. 108. 4th edit.

Idem. 107.

92. Mr. Fearne had previously observed, that "when the word heirs, &c. operates only to expand an estate in the ancestor, so as to let the heirs

described into its extent, and entitle them to take derivatively, through or from him, as the root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation. But when they operate only to give the estate imported by them to the heirs described, originally, and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase."

93. In some cases the same words operate as words of purchase, and also as words of limitation. Thus Lord Coke says, where a remainder is limited to the right heirs of B., it need not be said, and to their heirs; for being plurally limited, it includes a fee simple; and yet it rests but in one by purchase. 1 Inst. 10 *a*.

So where an estate is limited to the heirs male of the body of A., the eldest son of A. takes by purchase, and his male issue by descent.

TITLE XXXII.

DEED.

CHAP. XXI.

Construction.—By what words different Estates may be created

1. *What Words create an Estate in Fee.*
12. *What Words create an Estate Tail.*
13. *What Words restrain the word Heirs.*
25. *Limitation to A. and his Heirs, with a Remainder over.*
29. *Limitation to a Man and his Wife, and the Heirs of their Bodies.*
33. *Distinction between Heirs of the Body, and upon or on the Body.*
35. *Effect of a Limitation to the Heirs of the Body of A.*
40. *Usual Mode of limiting Estates Tail.*
42. *What Words create an Estate for Life.*
44. *What Words create an Estate for Years or at Will.*
46. *What Words create a Joint Tenancy.*
52. *What Words create a Tenancy in Common.*
61. *What Words create Cross Remainders.*
67. *Cases of Marriage Articles.*

SECTION 1.

What words create an Estate in Fee.

WITH respect to the words required to create an estate in fee simple, it is laid down by Littleton and by Lord Coke, that in all feoffments and grants the word heirs is absolutely necessary for that purpose, and cannot be supplied by any other word whatever.

Formulare Angl. Dissert.

2. Mr. Madox contends, that this doctrine is not so ancient as is generally supposed; for that formerly there were several modes of expression by which an estate in fee simple might have been created, without the word heirs; such as, to the feoffee *et suis*,

or *suis post ipsum*, or *habendum et jure hæreditario perpetuo possidendum*; so that it is probable this maxim was not fully established, till the principles of the feudal law were generally adopted: in which it was a rule, that the donation of a feud should be construed strictly, and not carried beyond the words. 1 Inst. 23 *b*. 2 — 336.

3. The form of a gift in fee simple in Bracton's time was, *habendum tali et hæredibus suis*; or *tali et hæredibus suis, vel cui terram illam dare vel assignare voluerit.* And it may be now laid down as a general rule, that in all feoffments and grants to natural persons, and also in all conveyances deriving their effect from the statute of uses, no word but the word heirs, however strong the intention may appear, will create an estate in fee simple. And it is observable, that there is really no other word in the English language, expressive of all the circumstances which constitute the idea of an heir. Bract. 17 *b*.

4. A gift to a man *et heredibus*, with livery of seisin, though the word *suis* be omitted, will pass an estate in fee simple: because the livery shall be taken most strongly against the feoffor. But if one gives land to two persons, to hold to them two, *et hæredibus*, omitting *suis*, they only take an estate for life, for the uncertainty. 1 Inst. 8 *b*. Plowd. 28.

5. Lord Coke says, if lands are given to a man and his heir, in the singular number, he will not take an estate in fee. But Mr. Hargrave observes, that according to many authorities, the word heir may be *nomen collectivum*; and operate in the same manner as heirs in the plural number. 1 Inst. 8 *b*. *n*. 4. 1 Roll. Ab. 832.

6. It was determined in a modern case, that the words, to the use of all and every the child or children of a marriage, equally share and share alike; if more than one, as tenants in common, and not as Doe v. Martin, 4 Term Rep. 39.

joint tenants; and if but one child, then to such only child, his or her heirs or assigns for ever; should be construed so as to create an estate in fee in all the children. The words "his or her heirs" being allowed to operate as words of limitation on all the preceding words in the sentence.

7. The rule that the word heirs is absolutely necessary to create an estate in fee simple, admits of a few exceptions. Thus, if a father enfeoffs his son, to hold to him and his heirs, and the son re-enfeoffs the father, as fully as the father enfeoffed him, an estate in fee simple will pass to the father.

1 Inst. 9 *b.* n. 6.

Idem. 8. If one coparcener or joint tenant releases all his right to another, it will pass a fee, without the word heirs. So if one coparcener grants a rent to the other, for equality of partition, an estate in fee simple in the rent will pass, without the word heirs; for as the rent comes in lieu of the inheritance, it has as strong a relation to the inheritance as if the word heirs had been mentioned.

Id. 10 *a.*

ante, c. 6. § 31. 9. In releases that enure by way of *mitter le droit*, the word heirs is not necessary to create a fee simple, as has been already stated.

1 Inst. 9 *b.* 10. In conveyances to corporations, whether sole or aggregate, the word heirs is not necessary to create a fee simple. But the law makes a distinction between a corporation aggregate, and sole corporation: for a feoffment to a corporation aggregate will pass a fee without any words of limitation; whereas in a feoffment to a corporation sole, the word successors is nccessary.

Idem. 11. An estate in fee will pass to the king without the words heirs or successors, partly, on account of his prerogative, and partly, because in judgement of law the king never dies.

12. With respect to the words that are necessary to create an estate tail in a deed, it is said by Lord Coke, that the word heirs is as necessary as in the case of a fee simple. For as every estate tail was a fee simple at common law, and as no fee simple could be created without the word heirs, it followed that an estate tail could not be created without that word. Therefore, if lands are given to a person *et semini suo*, or, *exitibus vel prolibus de corpore suo;* to a man and to his seed, or to the issues or children of his body; he has but an estate for life. For although the statute *de donis* provides that the will of the donor shall be observed, yet that will and intent must agree with the rules of law. And it has been long settled, that the word issue cannot operate in a deed as a word of limitation, so as to create an estate tail.

What Words create an Estate Tail. 1 Inst. 20 *a*. Id. 20 *b*. Nevil v. Nevil, 1 Roll. Ab. 587. Makepeace v. Fletcher, Com. R. 457. 4 Ves. Jun. 794.

13. No technical words, however, are required to restrain the general import of the word heirs to the lineal descendants of the grantee; therefore any words that show such an intention, will be sufficient.

What Words restrain the word Heirs.

14. Thus, Lord Coke says, if lands be given to B. *et hæredibus quos idem B. de prima uxore sua legitimè procrearet*; this is a good estate in special tail, although B. has no wife at the time, without the words *de corpore*. So it was if lands were given to a man and to his heirs, which he should beget of his wife; or to a man, *et hæredibus de carne sua*, or *et hæredibus de se*; in all these cases an estate tail was created, though the words *de corpore* were omitted.

1 Inst. 20 *b*.

15. Lord Coke also says, the word *engendrés*, or begotten, may be omitted; and if the word be *procreandis*, or *quos procreaverit*, the estate tail is good: and as the word *procreatis* shall extend to the issue begotten afterwards; so *procreandis* shall extend to the issue begotten before. But Lord Hale has ob-

Idem, & *n.* 3. & Id. 26 *b*. *n.* 1.

served on this passage, that where the words were *in posterum procreandis*, sons born before shall be excluded, on account of the peculiar force of the words *in posterum*.

Canon's Case, 3 Leon. 5.

16. Lord Talbot held, that where lands were limited in a deed to C. H. for life, and after his decease, to the heirs male of his body thereafter to be begotten; the words "thereafter to be begotten" did not confine it to the issue born after, but would likewise take in issue born before.

Hebblethwaite v. Cartwright, Forrest, 30.

§ 30.

17. Littleton says, if a man has issue, and dies; and land is given to the son and to the heirs of the body of his father begotten, this is a good entail, though the father was dead at the time of the gift. Lord Coke has observed on this passage, that the words, *the heirs*, were observable: for if the words had been *his heirs*, it would have altered the case. Therefore, if lands were given to the son, and to his heirs of the body of his father; the son could not take as heir of the body of his father, because the grant was to him and to his heirs, &c. But if there were grandfather, father, and son, and the father died, and lands were given to the son, and to the heirs of the body of the grandfather, this would be a good estate tail in the son.

1 Inst. 20 *a*. & *b*. 22 *a*.

18. The word heir in the singular number may in a special case create an estate tail. Thus, where lands were given to a man and his wife, and to one heir of their bodies lawfully begotten, and to one heir of the body of that heir only; it was held an estate tail.

ante, c. 20.

19. It has been stated, that where lands are given in the premises of a deed to A. and his heirs, *habendum* to him and the heirs of his body, he will only take an estate tail. And Lord Coke says, if lands are given to B. and his heirs, if B. have heirs of his

1 Inst. 121 *a*.

body, and if he die without heirs, that it shall revert to the donor; this is an estate tail.

20. It has also been stated, that where a person, in the premises of a deed, gives lands to another and the heirs of his body, *habendum* to him and his heirs for ever, he will take an estate tail with a fee simple expectant; but if it be added, that if he dies without heirs of his body, the lands shall revert to the donor, it will be an estate tail. ante, c. 20. § 89. 1 Inst. 21 *a.*

21. Littleton says, if lands are given to a man and his heirs males, or to a man and his heirs females, the donee will take an estate in fee simple; because the gift does not specify from what body the heirs male or female shall issue. And Lord Coke says, it was adjudged in Parliament, that where lands were given to a man and his heirs male, this was a fee simple; for the grant of a subject shall be taken most strongly against himself. § 31. 1 Inst. 27 *b.*

22. A feoffment was made to the use of the feoffee and the heirs of his body; and for default of such issue, to G. D. and his heirs male lawfully engendered; and for default of such issue, to the right heirs of the feoffor. All the Judges were of opinion, that G. D. took an estate in fee; and that it could not be an estate tail, because there was not any *body* from whom his heir male should come. Abraham v. Twigg, Cro. Eliz. 478.

23. But if there be any other words in a gift of this kind, from which an intention to restrain the generality of the words heirs male, to the body of the grantee, can be inferred, such gift will be construed to pass an estate tail.

24. A feoffment was made to the use of the feoffor for life, remainder to the use of G. B. son and heir of the feoffor, and the heirs male of his body lawfully begotten; and for default of such issue, to the Beresford's Case, 7 Rep. 41.

use of Aden Beresford and of the heirs male of the said Aden lawfully begotten; and for default of such issue, &c. The question was, what estate Aden took. It was contended, upon the authority of Abraham v. Twigg, that he took an estate in fee simple. But it was resolved, that he only took an estate tail; because there were words equivalent to the words *de corpore*.

ante, § 22.

Willes R. 374.

Lord Ch. J. Willes has said, that this case can hardly be cited as an authority in any case whatever: unless a deed of uses should happen to be penned exactly in the same words.

Limitation to A. and his Heirs with a Remainder over. Plowd. 53. 541.

25. It is laid down by Hales, Just. *arguendo*, in 4 Edw. VI., that if land be given to a person and his heirs, and if the donee die without heir of his body, that it shall remain to another; this shall be a good estate tail, by the equity of the statute; although it be out of the words. And this doctrine is confirmed by several cases.

Beck's Case, Lit. R. 344.

26. A feoffment was made to the use of the first son of James, who should have issue male of his body, and to his heirs; and for want of such heirs, to another. This was held to be an estate tail.

Leigh v. Brace, 5 Mod. 266. 1 Ld. Raym. 101.

27. A feoffment was made to the use of the feoffor for life, remainder to the use of his son Thomas and his heirs for ever, and for default of issue of the body of the said Thomas, to the use and behoof of the right heirs of the feoffor. The Court said, the intention of the feoffor was plain, that an estate in fee should not pass to the son. It was no more than if a gift had been made to a man and his heirs, viz. to the heirs of his body; so that it was only an estate tail.

Idle v. Cook, 1 P. Wms. 70.

28. In a subsequent case, where a copyhold was surrendered to the use of V. and A. his wife, *pro et durante termino vitarum suarum, et hæredum et assig-*

natorum prædictorum V. et A., et pro defectu talis exitus, to the use of the right heirs of the grantor for ever; it was held by Lord Holt, Powis and Powell, that this was an estate in fee: contrary to the opinion of Gould, who thought it should be construed an estate tail; that being the intent of the grantor.

Limitation to a Man and his Wife and the Heirs of their Bodies. Lit. § 25.

29. Littleton says, where lands are given to a man and his wife, and to the heirs male of their two bodies begotten, they have an estate tail. Lord Coke, in his comment on this passage, says; but what if the tenements be given to a man and to a woman, not being his wife, and to the heirs male of their two bodies? They have also an estate tail, albeit they be not married at that time. And so it is if lands be given to a man who has a wife, and to a woman who has a husband, and the heirs of their two bodies; they have presently an estate tail, for the possibility that they may marry.

Tit. 18. c. 1. § 8.

30. If lands be given to two husbands and their wives, and to the heirs of their bodies begotten, they shall take a joint estate for life, and several inheritances, viz. the one husband and his wife the one moiety, and the other husband and wife the other moiety. And no cross remainder or other possibility shall be allowed by law, where it is once settled, and has taken effect. But if lands be given to a man and two women, and the heirs of their bodies begotten, they have a joint estate for life, and every of them a several inheritance; because they cannot have one issue of their bodies. Neither shall there be, by any construction, a possibility upon a possibility; viz. that he shall marry the one first, and then the other. The same law is, where land is given to two men and one woman, and to the heirs of their bodies begotten.

§ 26, 7, 8.

31. Littleton says, if lands be given to a man and his wife, and to the heirs of the body of the man; in this case the husband has an estate in general tail, and the wife an estate for life. Also if lands be given to the husband and wife, and to the heirs of the husband, which he shall beget on the body of his wife; in this case, the husband has an estate in special tail, and the wife but an estate for life. And if the gift be made to the husband and wife, and to the heirs of the body of the wife, by the husband begotten; there the wife has an estate in special tail, and the husband but for term of life. But if lands be given to the husband and wife, and to the heirs which the husband shall beget on the body of the wife; in this case, both of them have an estate tail; because the word heirs is not limited to the one, more than to the other.

1 Inst. 26 *a.* *n.* 3.

32. Lord Coke has observed on this passage, that the word heirs is *nomem operativum;* to which of the donees it is limited, it creates an estate tail. But if it incline, no more to the one than to the other, then both do take: and therewith accords the case in 3 Edw. III., where *Robertus de S. dedit Johanni de Ripariis et Matildæ uxori ejus, et hæredibus quos idem Johannes de corpore ipsius Matildæ procrearet,* &c.; which was adjudged to be an estate in special tail in them both; because the estate was equally tailed to the heirs of the baron, as to the heirs of the wife.

1 Inst. 219 *a.* *n.* 3.

Distinction between Heirs of the Body, and upon or on the Body.

33. In conformity to the above cases, it has long been established, that where a limitation is made to the heirs of the body of the wife, by the husband to be begotten, the wife will take an estate tail. But if the words are to the heirs *upon* or *on* the body of the wife, by the husband to be begotten, both husband

and wife take an estate tail. And Mr. Fearne observes, that however light or frivolous the distinction in these cases between the word *of*, and the words *on* or *by*, may now appear, yet it having originally, upon principles now obsolete, obtained ground in judicial decisions, the Courts hold themselves bound to observe it. Rem. 46. 4th ed.

34. Thus where a limitation was to the husband and wife for their lives, remainder to the first and other sons of the body of the wife, remainder to the heirs of the body of the wife by the husband to be begotten; it was held an estate tail in the wife. But the Court said, if it had been to the heirs which the husband should beget *on* the body of the wife, it would have created an estate tail in both; for which was cited 19 Hen. VI. 75 *a.*, giving the same reason as Littleton does; because the word heirs was indifferently limited to both. Repps v. Bonham, Yelv. 131.

35. A person, in consideration of marriage, covenanted to stand seised to the use of himself and his wife for their natural lives, and the life of the longer liver of them; remainder to the use of the heirs *on* the body of the said wife by the said husband lawfully to be begotten; and for default of such issue, to the use of the right heirs of the husband for ever. A question arose, whether this limitation raised an estate tail solely in the wife, or a joint estate tail in the husband and wife. Mr. Justice Ashurst said, the question depended on positive determinations, rather than on reasoning. If the words of limitation had been—"the heirs *of* the body of the wife by the husband to be begotten," the case would be otherwise, and the wife would take an estate tail; but as the word was *on* and not *of*, all the determinations were the other way; particularly those in 3 Edw. III. and in Dunn v. Gillot, 4 Term Rep. 431.

Styles; and therefore both husband and wife took an estate tail. If the Court was at liberty to go into the intention of the parties, he should have been inclined to have read the word *of* instead of *on*, because the wife ought to be considered as a purchaser, but they were tied down by express authorities. Judgement was given accordingly.

Effect of a Limitation to the Heirs of the Body of A.

36. An estate tail may be created by a limitation to the heirs of the body of A., provided A. be dead when the limitation takes effect; and will vest in the person answering the description of such special heir. And in case of his death without issue, it will go to the person who would be entitled to such estate, if it had originally vested in the ancestor of the first taker.

Mandevill's Case, 1 Inst. 26 *b.* 220 *a.*

37. This doctrine is founded on the authority of the following case in 17 Edw. II.—John de Mandevill, by his wife Roberge, had issue Robert and Maude. M. de Merwell gave certain lands to Roberge, and to the heirs of John Mandevill her late husband, on her begotten. It was adjudged, that Roberge had an estate but for life, and the fee tail vested in Robert, (heirs of the body of his father being a good name of purchase); and that when he died without issue, Maude the daughter was tenant in tail, as heir of the body of her father; *per formam doni.*

Southcot v. Stowell, 2 Mod. 207. Cont. Rem. 110.

38. Mr. Fearne observes, that in the case of a limitation to the heirs male of the body of A., the devolution, after the decease and failure of issue male of the first special heir of A. to other heirs, equally falling within the same description, has been styled a descent *per formam doni.* But this sort of acquisition of, or succession to, an estate tail, by the heirs male of the body of A., in a collateral line between themselves, is not strictly a descent; nor does it operate as a purchase. It is not strictly or completely a

descent, because the estate never attached, or by possibility could attach, in the ancestor, or be derived from or through him. It has not the effect of a purchase, because the estate goes in the same course of succession as it would have done under a descent, exclusive of persons to whom it would have gone, if the heirs male had taken absolutely by purchase.

39. In a subsequent paragraph Mr. Fearne says— Idem, 112. "It seems in truth of a compound or intermediate description, betwixt a descent and purchase. In point of acquisition, it has the quality of the latter, as not being derived from or through the ancestor; but in regard to its course of devolution, it is referrible to the former, as pursuing the very same channel of transmissive succession. It is a sort of entail which, though it first attaches in the special heir, according to the nature of the description, yet terminates not in him and his representatives, of the species denoted, but continues its progress through the whole race of heirs described, in the same course as if it had been an estate vested in the ancestor, descendible from him to his heirs of that description.

40. The usual mode of limiting estates tail in settlements, where an estate for life is given to the ancestor, is, to the use of the first son of the body of the said A. B. by the said C. D. (his intended wife), and of the heirs male of the body of such son lawfully issuing; and for default of such issue, to the use of the second, third, and all and every other the son and sons of the body of the said A. B. by the said C. D. lawfully begotten; severally, successively, and in remainder, one after another, as they and every of them shall be in priority of birth; and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the Usual Mode of limiting Estates Tail.

elder of such sons, and the heirs male of his body issuing, being always preferred, and to take, before the younger of the same sons, and the heirs male of his and their bodies issuing: and for default of such issue, &c.

Owen v. Smyth, 2 H. Black. Rep. 594.

41. In a modern case, there was a limitation in a feoffment to the use of Nicholas Smyth for life, remainder to the use of the first son of the body of Nicholas Smyth lawfully issuing; and for default of such issue, to the use and behoof of the second, third, fourth, and all and every other son and sons of N. Smyth, lawfully issuing, severally and successively, &c.; and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, &c. Upon a case sent from the Court of Chancery to the Court of Common Pleas, respecting the estate which the eldest son of N. Smyth took under this limitation, Lord Chief Justice Eyre said—"I think this is one of the clearest cases I ever saw: there is a demonstration plain on the face of the feoffment, that it was the intent of the parties that an estate tail should be limited to the eldest son of N. Smyth. The argument on the part of the defendant has occasionally shifted; sometimes admitting the intent, but contending that the words used were not sufficient to effectuate that intent, which I thought was the true way of considering the question; and sometimes denying the intent itself. But no man can read this deed without seeing the intent I have mentioned; though by some strange blunder, the usual words are omitted. If, indeed, it had stopped at the limitation to the first son of Nicholas, I should have agreed with the counsel for the defendant; for it certainly does not follow, that because we can see an intent on the face of a deed, therefore that the words used are

sufficient to effectuate that intent. But the intent here does not rest on the first expressions; but the other part of the deed respecting the trusts and other limitations, refer to an estate tail in the first son of N. Smyth. The intent then being plain, the question is, whether we can find sufficient words? I, for one, adhere to the rule which forbids the raising estates by implication in deeds, and think that we ought not to grant the same indulgence to inaccuracy, in the construction of deeds, as we do in wills. But here it is not necessary to resort to implication, or to inquire whether the same latitude is to be allowed to conveyances to uses, as to wills; for here there are strict technical words, capable of being applied to the limitation of the first son of the body of N. Smyth, so as to give him an estate tail. The limitation is to the first son, and for default of such issue, the whole line of sons is taken in, without any particular limitation to them, and the heirs of their bodies *nominatim*; but it is to the several heirs male of the body and bodies of all and every such son and sons respectively issuing. Fortunately it is not said, to the heirs male of the body and bodies of such second, third, and other sons, &c. If it had been so, it could not perhaps have been got over. But the limitation is to the heirs male of the body and bodies of *every such son.* Now the case of Doe v. Martin is an authority to warrant the application of those words to the limitation of the first son of N. Smyth, as well as to the others. But this case is stronger than Doe v. Martin; for it does not even require the assistance of punctuation. Upon the whole, therefore, it is clear that the plaintiff took an estate tail under the limitation in the deed to the first son of the body of N. Smyth." The other Judges concurring in this opinion, the

ante.

Court certified that the plaintiff, who was the eldest son of N. Smyth, took an estate tail in the lands in question.

What Words create an Estate for Life.

42. With respect to the words that are necessary to create an estate for life, those usually inserted for that purpose in deeds, are, to hold to the said A. B. and his assigns for and during the term of his natural life. But it has been already stated, that if lands are conveyed to a natural person, without any words of limitation whatever, he will take an estate for his own life; unless the grantor be only tenant in tail, or tenant for his own life; in which cases the grantee will take an estate for the life of the grantor only.

ante, c. 19. § 14.

Fitzherbert v. Heathcote, 4 Ves. 794.

43. Under a limitation to the father for life, remainder to his issue male, and for want of such issue to the father in fee; Lord Bathurst held that the issue only took estates for life: in conformity to the opinion of Mr. Fazakerley and Mr. Wilbraham, to whom the case had been previously referred.

What Words create an Estate for Years, or at Will.

44. Estates for years are usually created in deeds by the words, "to hold to the said A. B., his executors, administrators, and assigns, from the day of the date hereof, for and during and unto the full end and term of twenty-one years, thence next ensuing and fully to be complete and ended:" but any other words showing the intention of the parties will be equally effective.

Lit. § 68.

45. The technical words for creating an estate at will are, to hold to the said A. B. at the will of the lessor.

What Words create a Joint Tenancy. Tit 18. c. 1.

46. With respect to the words which are necessary to create an estate in joint tenancy; it has been already stated, that where lands are granted to two or more persons, except husband and wife, to hold to them and their heirs, or for the term of their lives,

or for the term of another's life; without any restrictive, exclusive, or explanatory words; all the persons, to whom the lands are so given, take as joint tenants. 1 Inst. 180 *b.*

47. A man conveyed his house and farm to trustees, upon trust that his sisters might inhabit the house, and equally divide the rents and profits between them; and the whole to the survivor of them. Resolved, that this was a joint tenancy; for although the words equally to be divided sometimes in a will make a tenancy in common, yet the limitation to the survivor will oust such a construction, even in a will. Clerk v. Clerk, 2 Vern. 323. Ward v. Everett, 1 Ld. Raym. 422.

48. In the case of Fitzherbert v. Heathcote, a limitation to the issue male was held to create a joint tenancy for life. ante, § 43.

49. Where the words of a settlement were, "to permit all and every the children to take the rents to them and their heirs for ever," they took as joint tenants.

50. A settlement was made before marriage, in trust to permit the husband to take the rents for 99 years, if he should so long live, and after his decease, to permit the intended wife to take the rents for her life, for her jointure; and after the decease of the survivor of them, upon trust to permit and suffer all and every the child and children of the body of the husband, by the wife, to take the rents of the said premises, to them and their heirs for ever, in such shares and proportions as the husband should appoint; and for want thereof, in trust to permit and suffer all and every such child and children to receive and take the rents and profits of the said premises, to them and their heirs for ever. There were three children of the marriage, who survived their father Stratton v. Best, 2 Bro. Rep. 233.

and mother, and no appointment was made. The question was, whether the three children took as joint tenants, or tenants in common. Lord Thurlow declared that according to the true construction of the settlement, the estates comprised therein were to be considered as settled on the children of the marriage in joint tenancy, subject to the power of appointment, which was never executed.

On an appeal it was contended, that the purpose of the settlement was to make a provision for all the children of the marriage, and it must have been intended to make as beneficial a provision as possible. Under the first clause they would take as tenants in common. The intention of the second clause was to regulate the proportions, not to turn them into joint tenants. The estate was first given in shares and proportions; then the father was to regulate their shares; then the settlement directed how the rents and profits were to be paid, if there were no appointment. The second clause made no new provision. The heirs and assigns of the husband were not to take till all the children of the marriage were dead without issue; it was therefore intended that the children of a child who should die in the lifetime of the husband, or his wife, should be set in to take: and in order to effectuate this purpose, the children must take as tenants in common. One word in the settlement implied this intent very strongly: it was the word *every*, which implied in a degree severalty; that each should take something to him and his heirs for ever: and the same word being repeated in the second clause, where it was unnecessary if they were to take as joint tenants, showed the intention to be, that the children should take in severalty. The course of recent determinations was against estates in joint tenancy, and to

favour tenancies in common: and the Court had taken hold of any words it could for that purpose, wherever it was possible to discern an intention that the estates should be in common, and not in joint tenancy.

On the other side it was said, the objection taken from the word *every* was of no avail; that word was used in all cases where joint tenancies were raised. Supposing the words giving a power of appointment had even been express, as tenants in common, and not as joint tenants, that would not have affected the clause upon which the question turned; for the former clause never operated, the father having made no appointment. It therefore came to the subsequent clause; "and for want thereof, to permit all and every such child and children to take the rents, &c. to them and their heirs for ever:" not in shares and proportions; not equally to be divided, or accompanied by any words to make a tenancy in common: without such modification the words *ex vi terminorum* carried a joint tenancy, which was the old estate known to the law. It was contended that the intention could not be to make them joint tenants, because a child might have died, leaving a child, and the estate might have survived among the other children: but it might equally be contended, that if a child died before he could sever the jointure, it was intended he should not take his share from his brothers and sisters.

Lord Thurlow said, that whether the settlement was to be considered as the conveyance of a legal estate, or a deed to uses, would make no difference; and that it was a joint tenancy.

51. Where it was covenanted in marriage articles to lay out a sum of money in the purchase of lands, to be settled on the husband and wife for their lives,

with remainder to the heirs of both their bodies; and also, that certain leaseholds should be in trust for the children of the husband: the children were held to take the leaseholds as joint tenants.

Staples v. Maurice, 4 Bro. Parl. Ca. 568.

52. Sir Robert Staples, being seised in fee of certain lands, and possessed of others under leases from a bishop, for terms of years, renewable on payment of fines, by articles, covenanted in consideration of marriage, that he, his heirs, executors, or administrators, would lay out 2,000*l.* in the purchase of lands of inheritance, to be settled to the use of Sir Robert for life, with remainder to his intended wife for life; remainder to the use of their heirs of both their bodies. And it was also thereby covenanted, that the leases for years, whereof Sir Robert was then possessed, should be in trust for the said Sir Robert for life, and after his decease, to the use of and in trust for the children of the said Sir Robert by his intended wife. Sir Robert Staples died, leaving three sons; and a question arose, whether they took the leasehold estates as joint tenants, or tenants in common. The Court of Exchequer of Ireland decreed, that they took as tenants in common. From this decree there was an appeal to the House of Lords; the appellants insisting that all the children of Sir R. Staples were clearly joint tenants of the leasehold estate. They had the same interest, accruing to them all by virtue of the same deed, and which vested in them all at one and the same time, upon the death of Sir R. Staples. There was nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship, in all the joint tenants. And wherever that equality did not subsist, as between a corporation and a private person, there could be no joint tenancy. If any of the

joint tenants had a bad opinion of their own lives, they might sever the joint tenancy, and destroy the right of survivorship, by a deed, granting their respective shares in trust for themselves; or might enter into covenants not to take advantage of each other by survivorship. But if the joint tenancy was not severed, it was an evidence of intention in the party, to submit to the chance of survivorship; or of that supineness and neglect, to which the law affords no assistance.

On behalf of the respondent it was argued, that marriage articles were considered by the courts of equity as minutes of the intent of the several parties, to be afterwards carried into execution by a formal settlement; the intent, however, was the leading and capital rule: that in the present case there could not be the least doubt of the intent of the several parties to the articles. The portions thereby created for the children, were clearly meant as separate and distinct interests in each child, for the maintenance of each, and of the children he or she might have. But this very natural and rational intent was totally overturned by the notion of a joint tenancy, which let in a mischief never dreamt of by the parties; for if the younger children had died in the father's lifetime, leaving ever so many children, the eldest son, being heir of the father, and taking a considerable real estate as such, would, by the mere chance of survivorship, have carried off the whole of the father's real and personal estate; and the families of the younger brothers would have been left to beggary. That joint tenancy, originally applicable to land rights only, and derived from feudal principles, calculated for the support of military tenures, long since abolished, was now constantly discountenanced in courts of law and equity. Every

parent, in providing for his children, whether by will by articles, or by settlement, was naturally supposed to have in view, not only his own immediate children, but their posterity also; and that the provision he was making for his children, was such as might enable them to marry, and provide for a wife and their issue. And if this held in wills, where even children were considered as volunteers; *a fortiori* must it do so in marriage settlements, under which they were considered as purchasers for the most valuable of all considerations.

The decree was reversed, upon the principle that the children took as joint tenants.

What Words create a Tenancy in Common. Litt. s. 298. 2 Wms. S.

52. Littleton says, if lands be given to two, to have and to hold them, *scilicet* the one moiety, to the one and to his heirs; and the other moiety to the other and to his heirs; they are tenants in common. Lord Coke, in his comment on this passage, says, the reason is, because they have several freeholds, and an occupation *pro indiviso*; and that the *habendum* severs the premises, that *prima facie* seemed to be joint: for an express estate controls an implied one.

Litt. s. 298. 2 Wms. S.

Lewin, 17 Ves. 353.

53. A person covenanted to stand seised to the use of A. for life, and after to two, equally to be divided, and to their heirs and assigns for ever. Lord K. North declared, that the inheritance was in common. He said, it had been held, that where the words were to two equally divided, that should be in common; otherwise if the words were, equally to be divided: but since taken to be all one.

Worrall v. Harford, 8 Ves. 8. Litt.

54. A man assigned a term to trustees, in trust to permit himself to receive the profits thereof during his life, and after his death, in trust to permit his two daughters B. and C., their executors and admi-

nistrators, to receive the profits during the residue of the term, equally to be divided between them; they paying so much within two years to his two other daughters. The Master of the Rolls (Sir J. Trevor) held, that this being a trust of a personal thing, they were tenants in common; and that the father's intention appeared so in the consideration, which was to make several and distinct provisions for his two daughters; and the paying of the sums appointed to their two sisters, made them purchasers.

55. A copyholder in fee had issue four sons, and two daughters, and surrendered his copyhold to the use of his wife for life, and after her death, to the use of his three younger sons and two daughters, equally to be divided, and their respective heirs and assigns for ever. The question was, whether these words made a tenancy in common, or whether the sons and daughters took as joint tenants. The Judges delivered their opinions *seriatim*. Gould, Just.—The sons and daughters take as tenants in common, and not as joint tenants. In the construction of deeds this rule is to be observed, viz. to make all parts of them take effect, according to the intent of the parties, so as it be not contrary to the rules of law; and it will not be inconsistent with any rule of law, to construe this a tenancy in common; the words upon which we are to judge, being not words of limitation, or creation of an estate, but of qualification and correction. There are no precise words requisite to make a tenancy in common; the words equally to be divided, go to the quality of the estate, and not to the limitation of it. The intention of the surrenderor was to make provision for his younger children and their heirs; which will not take effect, if it be a joint estate. Surrenders of copyhold land to

Fisher v. Wigg, 1 P. Wms. 14. 12 Mod. 296. 1 Ab. Eq. 291.

Vide Tit. 37. uses shall have the same favourable construction as wills, and are not to be tied up to the strict rules of common law, but expounded according to the intention of the party. The words equally divided, or equally to be divided, make a tenancy in common in a will, beyond dispute; and we are here in the case of an use, which bears the like construction with a will. Turton, Just. of the same opinion, and argued much to the same effect. Holt, Ch. Just. contra. Copyhold lands do not differ in construction of law from freehold lands; and surrenders of copyholds must be governed by the same rules as conveyances at common law. By this surrender the sons and daughters are joint tenants, and not tenants in common; for the words equally to be divided, signify no more than the law would have implied without them; and therefore they can have no operation. 1 Inst. 186 *a*. One joint tenant can only forfeit or dispose of *his* own part; and if both join in a feoffment, and one die, it must be pleaded as the feoffment of both, and not of the survivor only. The true difference between joint tenants and tenants in common, is put in Littleton, § 292. Joint tenants hold by one joint title, but tenants in common by several titles. In our case the title is joint, and all claim under the same conveyance. The word *equally* doth not alter the manner of taking the profits, there being no difference in that respect between joint tenants and tenants in common. There is a difference between wills and conveyances at law, and words in the one shall have a different construction from what they would have in the other. It was after some time and debate that these words (equally to be divided) obtained to make a tenancy in common; and the doubt proceeded from hence, (*scil.*) because they did not

make an estate a tenancy in common at law; for if they had, there could then have been no doubt upon a will. It has been hitherto the constant opinion, both at the bar and at the bench, that those words will not make a tenancy in common in a deed. Judgement was given that it was a tenancy in common.

56. George Everinden by deed-poll, in consideration of natural love and affection to his wife and children, did give, grant, and confirm, to his two daughters, all the rents and profits of two tenements, during the life of his wife, equally to be divided between them, paying the sum of *5 l. per annum* to his wife; and after the decease of his wife, his two daughters, to share, hold, and enjoy the said lands, to them and their heirs for ever, equally to be divided between them. One of the daughters died leaving children. The question was, whether the two daughters took as joint tenants, or tenants in common. Rigden v. Valier, MSS. Rep. 2 Ves. 252.

Lord Hardwicke.—I have considered this case as well as I could; but after I have delivered my opinion, if the parties are not satisfied, I will put it into some other method of argument, considering the nature and nicety of the question, and the variety of *dictums* in the books. It is settled, that the words equally to be divided do in a will make a tenancy in common: nay, without the word divided, if it be only said *equally*, or share and share alike. But it was objected, that in a deed it must be taken otherwise: now I know of no solemn determination that these words will not make a tenancy in common, even in a deed. The principal case in which the learning upon this question has been drawn together, is Fisher v. Wigg. ante, § 55. It was said indeed to be of doubtful authority. Lord Chief Justice Holt, differing from the other two Judges, and the judgement said to be reversed. But

there never was any reversal, or even a writ of error brought; and therefore it is an authority as to a surrender of copyhold lands. In that case there is another anonymous one cited, 2 Vent. 365. upon a covenant to stand seised, which is directly in point to the present, though I can find no trace of it in the Register's book. In Lord Raymond's report, towards the end, there is a case cited of Hamerton v. Clayton, whereof the roll cannot be found; and in another, of Smith v. Johnson, which is said to have arisen upon a feoffment; which last Lord Holt, when observing upon the authorities urged by the two Judges, avoids the determination in, by saying it never came to a final judgement, upon account of the death of one of the parties. But these authorities seem express to support the opinion of the Court in Fisher v. Wigg: and upon the best consideration I can give the question, I am inclined to think that, be it in a will or deed, these words will make a tenancy in common; and to say otherwise would almost in every instance contradict the intent of the parties. I have the greatest reverence for the opinion of Lord Holt; but upon weighing the arguments, I own those of the two Judges appear to me to have more of natural reason, and his more of artificial and refined learning. Mr. Justice Gould's argument is an extraordinary good one, and not answered to my satisfaction. It is true, that case was upon a surrender, and those who argued to construe the words into a tenancy in common, compare a surrender to a will. Lord Chief Justice Holt insisting on the one hand, that it was to be construed as a deed, and rightly adds, that a surrender to uses is not like a deed to uses or trusts; for the surrenderor continues seised till the admittance of the surrenderee, who is not *cestui que use* in

the mean time, but when admitted, is in by grant of the lord, and the statute of uses does not extend to copyholds. But, if the reasoning of the other Judges be right, upon a surrender, it is much stronger and less liable to doubt than upon a covenant to stand seised, which is the manner the conveyance in question must operate. No livery was ever made upon this deed; it was to take effect after the death of the grantor, which, in a conveyance at common law, would be making an estate of freehold to commence *in futuro*. It is made in consideration of love and affection to his wife and children, and so cannot be good but as a covenant to stand seised. It was indeed said, that this, though a deed to uses, must be construed as a conveyance at common law, since otherwise the rules of construction will be confounded: now, it is true in general, that the construction of the words ought to be so; but that holds rather as to the limitation of the estate, than to the modification of the tenure, or manner of holding; as whether the estate given be a joint tenancy or a tenancy in common, in which case a greater latitude may be allowed, the law having no technical words to this purpose, as it has to the creating a fee simple or fee tail. 1 Inst. 190 *b*. "If a verdict finds that a man has, *duas partes manerii in tres partes divisas*, this shall not be intended a tenancy in common. But if it be *in tres partes dividendas*, then it seems that they are tenants in common by the intendment of the verdict." And if these words will amount to a tenancy in common in a verdict, why shall not they do the same in a deed to uses; since the only latitude of construction allowed to a verdict, beyond an averment in a court, or plea in bar, is matter of description? Thus the case stands upon comparing it with

that of Fisher v. Wigg, and the differing opinions of the learned Judges who debated it.

But there are other reasons and circumstances which strengthen the construction of this deed, in a court of equity. Here is a father making a provision for his children; and if the estate given be construed a joint tenancy, the share of the sister so dying goes to the survivor, in prejudice of her own children.

This Court has taken the liberty of making a tenancy in common, in many cases, even without the words equally to be divided: as when mortgage money has been lent by two persons in equal moieties, and the security taken to them and their heirs; the Court has held no joint tenancy to be intended by that conveyance. Indeed in purchases where the money has been advanced in like proportions, it has been said to be otherwise; but when one advances more than the other, the Court has always held it a tenancy in common, upon the ground of intention; ever inclining much against joint tenancy and survivorship. The father has put his own construction on this deed. I am therefore of opinion for the plaintiff, upon the authority of Fisher v. Wigg; strengthened by the special circumstances of this case. But as the books are a good deal unsettled upon the general point, if the defendant is not satisfied, I will send it to be argued before the Lord Chief Baron and Mr. Justice Burnet, at their chambers, who may certify their opinions to me: for the estate being of small value, the expence of making a case for the Court of King's Bench would be too heavy on the parties.

N. B.—Mr. Attorney General, the defendant's counsel, declaring himself satisfied with the opinion of the Court, the decree was accordingly.

57. John Curl, by indentures of lease and release, conveyed the lands in question to trustees, to the use of himself and his wife for their lives, remainder to the use of all and every the children of John Curl, and their heirs, equally to be divided amongst them. The question was, whether they took as joint tenants or tenants in common. Lord Ch. Just. Lee delivered the unanimous opinion of the whole Court, that this being a deed of uses, must be construed according to the intent of the parties, which most plainly was, that the children should take in common. And they relied upon the case Fisher v. Wigg, where the same point was determined in the case of a copyhold, which the Chief Justice said was never reversed, notwithstanding what is said in 1 Ab. Eq. 291. The Court also cited the case of Rigden v. Vallier; and gave judgement that the words equally to be divided, in a deed of uses, created a tenancy in common.

Goodtitle v. Stokes, 1 Wils. R. 341.

ante, § 55.

58. In a modern case Lord Mansfield said, the opinion of the two Judges in Fisher v. Wigg, who differed from Lord Holt, appeared to be the better one; more liberal and better founded in law. And Mr. J. Aston observed, that the words equally to be divided, had been determined to create a tenaucy in common in a deed.

Cowp. R. 660.

59. It has been stated, that in several cases where two or more persons make a joint purchase, they shall be considered in equity as tenants in common; though the words equally to be divided be not inserted in the conveyance.

Tit. 18. c. 1. § 34, 5, 6.

60. The usual manner of creating a tenancy in common, is to limit the estate to two or more persons, equally to be divided among them; they to take as tenants in common, and not as joint tenants.

What Words create Cross Remainders.

61. When lands are given in undivided shares to two or more persons, for particular estates, so as that upon the determination of the particular estates in any of those shares, they remain over to the other grantees, and the remainder-man or reversioner is not let in till the determination of all the particular estates; there the grantees take their original shares as tenants in common; and the remainders limited among them, on the failure of the particular estates, are called cross remainders. But no technical words are necessary to create such remainders; for any expressions which sufficiently indicate the intention of the parties will have that effect.

1 Saund. 185. *n.* 6.

62. It is however a fundamental rule of law, that cross remainders cannot be implied in a deed. And Mr. Serjeant Williams observes, that the reason of this rule is to be founded in 1 Roll Ab. 837. R. pl. 2., where it is said, that if a man makes a feoffment in fee, to the use of J. S. and J. D., and the heirs male of their bodies; and for default of such issue of either of them, to the use of the survivor of them, having issue male, and to the issue male of such issue male; and for default of issue male of their bodies, the remainder to another: by this gift J. S. and J. D. have several inheritances: and no cross remainder in tail is raised by the words after, for want of the word heirs; for though it be by way of use, yet an estate tail cannot be raised without the word heirs.

Nevell v. Nevell.

Cole v. Levingston, 1 Vent. 224.

63. In ejectment upon a long special verdict, the following point was resolved by the Court, and declared by Lord Hale as the opinion of himself, and the rest of the Judges:—That where one covenants to stand seised to the use of A. and B. and the heirs of their bodies, of part of his land, and if they die

without issue of their bodies, then to remain, &c.; and of another part of his land, to the use of C., D., and E., and the heirs of their bodies, and if they die without issue of their bodies, then to remain, &c. That here, there are no cross remainders created by implication; for there never shall be such remainders upon the construction of a deed, though sometimes there are in the case of a will.

64. A. upon the marriage of his son B., who had two children then living, conveyed lands by deed to trustees, to the use of himself for life, remainder to B. for life, remainder to trustees to preserve contingent remainders, remainder to the use of such child or children of B., and in such shares, &c. as B. should appoint; and in default of appointment, to the use of all and every the children of B., and the heirs of their several and respective bodies, as tenants in common; but if only one child, to the use of such only child, and the heirs of his or her body; and in default of all such issue, to the right heirs of A. for ever. B. had other children, and died without having made an appointment. It was held, that B.'s children took vested interests as tenants in tail, notwithstanding the power of appointment; and that there were no cross remainders between them, but on the death of each child without issue, his share fell into the reversion. Doe v. Dorvell, 5 Term Rep. 518.

65. By a settlement made previous to marriage, lands were limited to the use of all and every the daughter and daughters of the marriage, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and for default of such issue, to the use of the right heirs of the husband. A question arose upon this settle- Doe v. Worsley, 1 East R. 416.

ment, whether there were cross remainders between the daughters and their issue.

Lord Kenyon said, this was the case of a deed, in which by the practice of centuries no such implication could be raised. And it would be of most dangerous consequence to have this point disputed, upon which so many titles must depend. It was probably intended, that no part of the settled estate should go over, as long as there was any issue of the marriage remaining; but the parties had not said so. There were certain words used to express such an intention in deeds, which were well known; those had not been adopted in the present case, but the framers of the settlement had left that intention to be implied from other words, which could not be done. He would not go through all the cases, because they were collected with great ability by Mr. Serjeant Williams, in a note, in his edition of Saunders Reports, to which he referred. They established the proposition he had before laid down, in respect to the construction of deeds, which never had or could be suffered to be doubted, without affecting an infinite proportion of the property of the kingdom, and removing land-marks.

Vol. 1. 185 *a.* *n.* 6.

Mr. Justice Lawrence observed, that in order to raise cross remainders in a deed between the issue of the first takers, there must be a limitation to the heirs of the body, which was not necessary in a will. And Mr. Justice Le Blanc remarked, that it was not sufficient in a deed, that one may collect such an intention of the parties from the words; but cross remainders must be expressly limited, by proper words of conveyance. It was resolved, that no cross remainders were created in this case.

66. The limitations in a deed were, to the use of such child or children as Mary Abell should thereafter have, as tenants in common (if more than one), and the heirs of their several bodies issuing. "And in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts of him, her, or them so dying without issue, should be and remain to the use of the surviving child or children of the said Mary Abell, and the heirs of his, her, or their respective bodies issuing, and so *toties quoties*, as any of the said children should die without issue, till there should be only one child left; and in case all the said children should die without issue, or if the said Mary Abell should have no issue of her body, then to Robert Abell, his heirs and assigns for ever."

Doe v. Wainwright, 5 Term R. 427.

The question was, whether there were cross remainders between the children of Mary Abell.

Lord Kenyon said, this case did not involve any question respecting the raising of limitations by implication, because the deed on which the question arose, contained express limitations by way of cross remainders, not indeed in the formal language used by conveyancers, but in terms sufficiently denoting the intention of the parties to the deed, that there should be cross remainders, as to some of the children. Therefore, all the cases which were cited to show that cross remainders in a deed could not be raised by implication, might fairly be laid out of the case; because this case, when considered, did not resolve itself into any question of that kind. No technical precise form of words was necessary to create cross remainders; it was sufficient to say, that there should be cross remainders; though in the verboseness of conveyancers, an abundance of words

was generally introduced in deeds for this purpose. Here the single question arose on the meaning of the word, surviving, which indeed was the only word that distressed the case. But taking the whole context together, he did not think that that word rendered the case doubtful. The fair construction of that word, standing in the context, was, that on the death of one child without issue, that portion should go to the surviving line of heirs, and not entirely to one child surviving. It must go to the surviving children in their own persons, if living, or if dead, to their issues. And in putting this construction, he did not think the Court proceeded on conjecture merely, for the conclusion of this sentence was—"and in case *all* the said children should die without issue," then the remainder is limited to R. Abell in fee. The Court could not give effect to the word *all*, without determining that there must be cross remainders, not only as long as the individual children, but as long as the several lines of those children, existed. The whole context required this construction, and the last clause could not be satisfied with any other.

Judgement was given, that the deed created cross remainders between the children of M. Abell; and that on the death of one without issue, his share vested in a surviving child, and the heir of one deceased, as tenants in common.

Cases of Marriage Articles. ante, c. 19. § 66.

67. In the case of marriage articles, the construction is founded on the apparent intention of the parties, however untechnically expressed: and is therefore more liberal than in the case of deeds.

Twisden v. Locke, Amb. 6 63.

68. By articles entered into previous to a marriage, the intended husband covenanted to transfer stock to trustees, to be laid out in the purchase of land, which was to be settled to the use of the husband and wife

for their lives; and after the death of the survivor, to the use of all the children, male and female, of their bodies, equally, as tenants in common, and their respective issue: and for default of such children and their issue, to the use of the heirs and assigns of the survivor of the husband and wife.

Lord Camden said, he was clear there could not be cross remainders by implication in a deed; that this was not the case of a settlement completed, but of articles executory: by the first part of the articles, which considered the fund as money, nothing was to go over till the children were dead without issue; this would assist him in construing the limitations of the land. As the survivor of the husband and wife was to take nothing in the money, till all the children were dead without issue, so they should not take any interest in the reversion of the land, but in the same way. Decreed that there were cross remainders.

Duke of Richmond's Case, Collect. Jur. vol. 2. 347.

69. By articles of agreement made between Charles Duke of Richmond and William Earl of Cadogan, previous to the marriage of Lord March the Duke of Richmond's eldest son, with Lord Cadogan's daughter, Lord Cadogan covenanted to lay out 60,000 *l.* in the purchase of lands, to be settled on Lord March and his intended wife for their lives, remainder to the children of the marriage, except an eldest son, as the father and mother should appoint; and for want of appointment, to all the children, except an eldest son, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, and to the several and respective heirs of their respective bodies issuing; and for want of such issue, to the use and behoof of such eldest son in tail, remainder to Lord Cadogan in fee. Lord March, who was afterwards Duke of Richmond, had issue by

this marriage an eldest son, and six younger children; no appointment was made. By a private act of parliament the lands purchased with the 60,000 *l.* were vested in the eldest son, upon his securing the portions of the younger children: one of the younger children died under age; and a question arose whether her portion became vested in the surviving younger children, or went to the eldest son.

Lord Apsley said, the words of the articles imported that cross remainders should be limited to the younger children; it being perfectly plain that the eldest son was never intended to take any share of the 60,000 *l.* so long as there remained a younger child in being, to take: for if there had been one younger child only, that child must have taken the whole. And decreed accordingly.

TITLE XXXII.

DEED.

CHAP. XXII.

Construction.—Of the Rule in Shelley's Case.

1. *Origin and Nature of the Rule.*
11. *How mediate Limitations are vested.*
13. *Of joint and several Limitations.*
19. *Both Estates must be by the same Instrument.*
25. *And be of the same Nature.*
28. *The Rule not extended to the Words Son, Child, &c.*
29. *Nor to the Word Heir in the Singular Number.*
32. *Nor to Marriage Articles.*
49. *Settlements in pursuance of Articles rectified.*
54. *Except in Cases of Creditors.*
56. *The Rule not formerly applied in Cases of Terms for Years.*
60. *But is now applied.*
63. *Unless a contrary Intention appear.*

SECTION 1.

Origin and Nature of the Rule.

WHERE an estate was conveyed to A. for life, with a remainder to the heirs, or the heirs of the body of A.; if the construction had been made according to the strict meaning of the words, A. would have taken only an estate for life, and the words heirs, or heirs of the body of A., would have been considered as words of purchase, giving a contingent remainder to the heirs or heirs of the body of A. But it was found that this would be attended with several inconveniences.

2. 1°. The lord of the fee would be defrauded of the wardship and marriage of the heir, who would take as a purchaser, without claiming any thing

from his ancestor by hereditary succession. 2°. The remainder to the heirs, or heirs of the body, being contingent till the death of the ancestor, the inheritance would be in abeyance: and it has been observed, that this was never allowed but in cases of absolute necessity. 3°. If the remainder were construed to be contingent, no alienation of the inheritance could take place during the life of the ancestor.

Tit. 1. § 47, 48.

3. To remedy this, it appears to have been very early established, as a rule of law, that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee, or in tail; that always in such cases (the heirs) are words of limitation of the estate, and not words of purchase." From which it follows, that such remainder is immediately executed in possession, in the ancestor so taking the freehold, and is not contingent.

1 Rep. 104 *a*. 1 Inst. 22 *b*. 319 *b*. 2 Roll. Ab. 414.

ante, c. 20. § 91.

Hargrave's Tracts, 501.

4. The case from which this rule took its name, and in which it was finally established, was thus. E. Shelley being tenant in tail, suffered a recovery, and declared the uses of it to himself for life, without impeachment of waste, remainder to a trustee for 24 years, remainder to the heirs male of the body of E. Shelley, and the heirs male of the body of such heirs male, remainder over. It was resolved by the Chancellor, and all the Judges of England, except one, that the words heirs male of the body of E. Shelley, should be construed to operate as words of limitation, and not as words of purchase; therefore that E. Shelley took an estate tail.

Shelley's Case, 1 Rep. 93.

Shelley v. Earsfield, 1 Rep. in Cha. 110.

5. In this case it was said *arguendo*, that "if it should be admitted that in regard of the said subsequent words (heirs male of the body of such heirs

1 Rep. 104*a*. & *b*.

own life, by implication; and that the subsequent limitation to his heirs male was executed in him, and united to the estate for life; so that he became tenant in tail.

9. Where the ancestor takes only an estate for years, another person being the grantor, a remainder to his heirs, or the heirs of his body, will not vest in himself, but in such heirs, by purchase. 1 Inst. 319 *b.*

10. A settlement was made upon a marriage by a third person, to the use of the husband for 99 years, remainder to trustees during the life of the husband, to support contingent remainders, remainder to the wife for life, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband. It was admitted that the remainder in fee to the husband was contingent, because he only took the particular estate for years; and the estate did not originally move from him; for if it had, the remainder limited to his right heirs would have been the old reversion. Tippin's Case, cited 1 P. Wms. 359.

11. Where the subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union with his particular freehold, one estate of inheritance in possession. But where such limitation is mediate, it is then a remainder, vested in the ancestor; who takes the freehold, not to be executed in possession, till the determination of the preceding mesne estates. But an intervening limitation for years, will not prevent the subsequent limitation from being immediately vested. How mediate Limitations are vested. Fearne, Cont. Rem. 37, 8. Bates v. Bates, 1 Ld. Raym. 326.

12. Where the limitations intervening between the first estate for life, and the limitation to the heirs of the body, are contingent, the estate for life is not merged; because the intervening limitations would Fearne, Id. 42. Bowles's Case, Tit. 16. c. 1. § 51.

Meredith v. Leslie, Tit. 36.

be thereby destroyed: but the two limitations are united, and executed in the ancestor, only till such time as the intervening limitations become vested; and then they open, and become separate, in order to admit such intervening limitations, when they arise.

Of joint and several Limitations. Fearne, Id. 40.

13. Where there is a joint limitation of the freehold to several, followed by a joint limitation of the inheritance in fee simple to them; as an estate to A. and B., for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, it seems the fee vests in them jointly. And so if the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them; as they are capable of issue, to whom such joint inheritance can descend. But if the limitation of the freehold be not joint, but successive; as to the husband for life, remainder to the wife for life, remainder to the heirs of their bodies; there it seems the ultimate limitation is not executed in possession, but gives them a joint remainder in tail.

Stephens v. Bretridge, T. Raym. 36.

14. Sir Francis Wortley, in consideration of an intended marriage with Hester, covenanted to stand seised to the use of himself for life, remainder to Hester for life, remainder to the heirs male which he should beget upon the body of the said Hester. It was resolved, that the estate tail was not executed, because there was an intervening remainder limited to the wife.

Fearne, Id. 44.

15. Where an estate for life is limited to A., with a remainder to the heirs of A. and B., this is a contingent remainder, and not a vested estate. So if there be a limitation to the wife for life, remainder to the heirs of the body of the husband and wife;

for the freehold is limited to her alone; and as the person who is to take in remainder, must be heir of both their bodies, if the wife should die before the husband, there can be no one to answer that description, when the particular estate determines: because the husband cannot have an heir during his life; nor could it be involved or flow into the limitation to the wife herself, as not being confined to her own heirs. Therefore the remainder is in contingency.

16. Sir R. Frank, on the marriage of his son, levied a fine, and declared the uses to himself, during the joint lives of himself and his son Leventhorp Frank; and after the decease of either of them, to the use of Susan Cotele for her life; and after her decease, to the use of the issue male of the said Susan and Leventhorp, and the heirs of their bodies; and in default of such issue, to the use of the heirs to be begotten on the body of Susan by the said Leventhorp; remainder to the right heirs of Sir Richard Frank. The marriage took effect, and Susan died, leaving five daughters, but no son. Sir Richard died, leaving Leventhorp his son and heir. A question arose on the estate which Leventhorp took. The Court resolved, first, that if he had been joint tenant with the wife for life, this had been an estate tail in both, as the word heirs is not applied to any body particularly, as Lit. § 28. Secondly, that neither the husband nor wife had an estate tail; not the husband, because he had no prior estate for life; nor the wife, because, though she took an estate for life, yet the heirs were not applied to her body. Thirdly, that it was a contingent remainder, to the heirs of both their bodies.

Gosage v. Taylor, cited 2 Term Rep. 435.

17. Where the particular estate is granted to two persons, with a limitation to the heirs, or heirs of the

body of one of them, the inheritance is executed in the person to whose heirs it is limited.

Alpass v. Watkins, 8 Term R. 516.

18. In a modern case, lands were conveyed by lease and release, in consideration of marriage, to John Watkins for life, remainder to Susannah Stephens his intended wife for life, for her jointure, remainder to the use of the heirs of the body of the said Susannah, by him the said John Watkins to be begotten, and of their heirs and assigns for ever. Lord Kenyon said, there was no case from Shelley's case down to that time, in which it had not been holden, that words in a deed similar to those in this deed, did not create an estate tail. If the Court were to determine otherwise, they would entrench on established rules of law, and defeat the intention of the parties, in this and almost every other case.

Cont. Rem. 41.

Mr. Fearne observes, that limitations of this kind are said to be executed *sub modo*, that is, to some purposes, though not to all: for though they are so far executed in, or blended with the possession, as not to be grantable away from, or without the freehold, by way of remainder; yet they are not so executed in possession, as to sever the jointure, or entitle the wife of the person so taking the inheritance to dower.

Both Estates must be by the same Instrument.

19. This rule does not take place unless the particular estate, and the remainder to the heir or heirs of the body, are created by the same conveyance; for, by the very words of the rule, as stated in Shelley's case, both estates must be limited by the same gift or conveyance.

Cranmer's Case, 2 Leon. 5—7.

20. Thus it was determined, so long ago as in 16 Eliz., that if a lease was made to A. for life, remainder to the right heirs of B., and B. should purchase the estate of A., the remainder would not thereby become

executed: for it was not conveyed by the original grant, but by the act of another person, after the original grant.

21. A., on the marriage of B. his son, settled lands to the use of B. for life, remainder to the wife of B. for life, remainder to their first and other sons in tail, with reversion to himself in fee. Afterwards A. devised the same lands to such issue male as B. should have by any other wife, in tail male; and in case of failure of issue male of B., to his grandchildren by his daughter C. in fee. B. suffered a recovery, and died without issue male. Lord Ch. Just. Holt held clearly that the devise to B.'s issue male by any other wife could not be tacked to his estate for life, because that was limited by another conveyance. Moor v. Parker, 1 Ld. Ray. 37.

Lord K. Wright is reported to have said, respecting this point, that all the authorities were in the affirmative; that if by the same deed, they should consolidate; not negatively, that if by different deeds, they should not: but this point is now fully settled. 2 Vern. 486.

22. Claude Fonnereau, by indenture made between him and his eldest son Thomas, in consideration of natural love and affection, granted an estate to Thomas for life: afterwards the father, by his will, devised the reversion to the heirs male of the body of Thomas. Lord Mansfield said the Court was unanimous in thinking that the estate for life being by one instrument, and the limitation in tail by another, they could not unite. Doe v. Fonnereau, Doug. 487. 510.

23. There is however an exception to this rule: for where an estate is limited to A. for life, by deed, and a limitation is afterwards made in A.'s lifetime, to his heirs, by an execution of a power contained in the same deed: there Mr. Fearne was of opinion that the limitations would unite; because the limitation Cont. Rem. 99.

of a use under the execution of a power operated as a use created by, and arising under, that conveyance itself; and of course was the subject of the same construction, so far as the time of its taking effect admitted, as it would have been if expressly specified and ascertained in the original deed.

Venables v. Morris, 7 Term Rep. 342. 438.

24. By a settlement made after marriage, lands were limited to S. Morris for life, remainder to the use of Hannah Morris his wife for life, remainder to trustees and their heirs, to preserve contingent remainders; and after the several deceases of S. Morris and his wife, to the first and other sons of the marriage severally in tail, remainder to the use of the first and other daughters successively in tail, remainder to the use of the said Hannah Morris, and the heirs of her body: and for default of such issue, to the use of such person or persons as Hannah should at any time, notwithstanding her coverture, by any deed limit or appoint. Hannah Morris, by a deed poll duly executed, reciting her power, and that she was desirous to limit the reversion of the said premises, in default of any issue of her body, appointed the premises to the use of the right heirs of S. Morris for ever.

The question was, whether the heirs of S. Morris took any estate under this appointment: and it was contended, on behalf of the heir of S. Morris, to be a general rule, that an appointment in pursuance of a power, created by a former deed, when executed, was to be taken as if it were inserted in the original deed, and was supplementary to it; in which case the appointment of the ultimate remainder to the heirs of S. Morris, must have the same construction, as if the limitation had been inserted in the antecedent deed: and then, according to the rule in

Shelley's case, this would operate to give an estate in fee to S. Morris, from whom the defendant (the heir of S. Morris) would claim by descent. The Court appears to have assented to this argument, for Lord Kenyon said —" If the limitation to the heirs of S. Morris be a legal estate, it enlarged the estate in the ancestor, and gave him a fee." But the Court being of opinion that the appointment did not create a legal estate, certified upon another ground.

And be of the same Nature.

25. The estate for life, and the subsequent limitation, must be of the same nature; that is, both legal, or both equitable; for if the first limitation be of a trust estate of freehold, and the subsequent one, carries the legal estate, the rule will not take place.

Tit. 12. c. 1. § 18.

26. Thus in the case of Lord Say and Sele v. Jones, where a trust estate was devised to a woman for life, and a legal remainder to the heirs of her body, it was held that the heirs of her body must take by purchase; there being no instance where the legal limitation of an estate to the heirs of the body of any person, had been united to a prior limitation of the surplus profits of such estate to the same person for life, so as to make such person tenant in tail by construction of law.

3 Bro. Parl. Ca. 113.

27. It is the same where a person takes a legal estate for life, with a limitation of the equitable estate to his heirs. For in the case of Venables v. Morris, the Court of King's Bench held, that as S. Morris took a legal estate for life, and the limitation to his heirs only carried an equitable estate, the two estates did not unite.

The Rule not extended to the Words Son, Child, &c.

28. As one of the principal reasons for establishing this rule, was to prevent an abeyance or suspension of the inheritance, it is only applied to limitations in which the word heirs is used, on account of the

maxim that *nemo est hæres viventis.* So that if lands are limited to A. for life, remainder to his first and other sons, and the heirs of their bodies, or remainder to the child and children of A., or to the issue of A., and the heirs of their bodies, no more than an estate for life will vest in A., and the words son, child, or issue, will be construed words of purchase.

Nor to the Word Heir in the Singular Number.

29. The word heir in the singular number, with words of limitation superadded, is a word of purchase, in a deed; because it is construed as a description of the person intended to take.

Waker v. Snow, Palm. 359.

30. A fine was levied by A. to the use of himself for life, remainder to his first son and to the heirs male of his body begotten, &c., and so on to his sixth son successively, remainder to the right heir male (in the singular number) of the conusor, to be beggotten after the said sixth son, and of his heirs male. It was ruled, upon evidence at bar, that this limitation to the heir male was only a contingent remainder, and not an estate tail in A., because it was limited to particular persons.

Bayley v. Morris, 4 Ves. 788.

31. By indenture made in consideration of marriage, a sum of money was directed to be laid out in lands, to be settled to the husband for life, remainder to the wife for life, remainder to the heir male of the body of the wife begotten by the husband, and to the heirs or executors of such heir male. It was resolved, that this was a contingent remainder in fee, to such person as should be heir male of the body of the wife at her death.

Nor to Marriage Articles. Fearne Cont. Rem. 123.

32. This rule is not adopted in the construction of marriage articles, because they are considered in equity as executory, and to be construed according to the intention of the parties. That a provision for the issue of the marriage is one of the great objects

of such agreements; consequently, that the intention of the parties, however untechnically expressed, must be, to make such a settlement as shall contain an effectual provision for that issue; who are purchasers for a valuable consideration, and whose rights ought to be protected. So that where in marriage articles it is agreed to settle lands to the husband for life, with remainder to the heirs of his body, by his intended wife; these last words are construed to be words of purchase, and to mean the first and other sons of the marriage, and the heirs of their bodies: for otherwise the husband would be tenant in tail, and might suffer a recovery, whereby the provision intended for the children of the marriage would be defeated. 1 P. Wms. 145.

33. Sir John Trevor, by articles in consideration of his intended marriage with Jane Pulestone, covenanted with trustees to convey and assure to them and their heirs certain estates, to the use of himself for life, without impeachment of waste, remainder to his intended wife for her life, remainder to the use of the heirs male of his body, on her body to be begotten, and the heirs male of such heirs male lawfully issuing; with remainder to the use of his own right heirs. And covenanted that the said premises should remain to his intended wife during her life, after his own decease, free from all incumbrances. And that in case the said uses and limitations in the said articles were not thereafter well raised, according to the true intent and meaning of the articles; then he and his heirs should stand and be seised of the said premises, until such time as a farther assurance should be thereof made, to the uses of the said articles. Trevor v. Trevor, 1 Ab. Eq. 387. 5 Bro. Parl. Ca. 122.

The marriage took effect, and there was issue an eldest son, and several other children. No settlement was ever made pursuant to these articles, but the

eldest son having incurred his father's displeasure, by an improvident marriage, and Sir John Trevor apprehending that he had an estate tail vested in him, which it was in his power to bar, levied a fine of the premises, and settled them on his second son. Upon the death of Sir John Trevor, his eldest son filed his bill in the Court of Chancery, praying a specific performance of his father's marriage articles, and to have a conveyance made according to the intention thereof; insisting that those articles were only an executory agreement, for a further settlement of the premises; and that it was not in the power of his father to bar the limitations thereof. The cause was heard before Lord Chancellor Parker, who said, the case ought to be considered as if the bill had been brought within two years after the making of the articles; if a bill had been then brought, there could have been no doubt but that a settlement must have been decreed, pursuant to the intention of the articles. That upon articles the case was stronger than on a will. Articles were only minutes or heads of the agreement of the parties, and ought to be so modelled, when they come to be carried into execution, as to make them effectual. That the intention of the parties was only to give Sir John Trevor an estate for life; if it were otherwise, it would have been vain and ineffectual; as it would have been in his power, as soon as the articles were made to have destroyed them. That then the consideration of love and affection which he had to his intended wife, and the heirs male of their two bodies, would have run thus: that he did, in consideration thereof, settle an estate on himself, which he might give away from his heirs male whenever he thought fit. That this limitation to the heirs male of his body, was in effect

but a limitation to his first and other sons; and if the articles had been so penned, would not the Court of Chancery have decreed a limitation to trustees to preserve them? It was declared, that Sir John Trevor took only an estate for life, under these articles; and that the remainder to the heirs male of his body, &c. gave an estate tail, by purchase, to the first and other sons of the marriage. And it was decreed, that the lands should be conveyed to the eldest son in tail male, remainder to the other sons in the same manner.

On an appeal from this decree to the House of Lords, it was argued on behalf of the appellants, that Sir John Trevor, by virtue of the articles, became actually seised of an estate tail in the premises, subject to his wife's estate for life therein: and that the articles themselves amounted to a settlement, and operated as such, by way of a covenant to stand seised.

On the other side it was contended, that by the whole scope of the articles, it manifestly appeared they were never designed for a settlement, but only a bare agreement, how and to what uses the lands comprised therein should be settled; and that the covenant to stand seised in the latter part of the articles, could not be taken as a final settlement; either from the words of it, or the precedent parts of the articles; but as provisional only, and till a settlement should be made in form, and effectually to answer the intent and agreement of the parties. That it could never be presumed, Sir John was to have any greater estate than for life, without impeachment of waste; or that it should be in his power to defeat the heirs male of that provision, which, by the articles, was intended to be made for them, after the

death of Sir John and his Lady; for the articles were founded upon consideration of the marriage, and Sir John's affection for his then intended wife, and the heirs male of their bodies to be begotten; so that the consideration extended as well to the issue male of the marriage, as the intended wife. That the estate limited to Sir John was in express words, for his life only, without impeachment of waste; which would have been vain, and to no purpose, if he was to have been tenant in tail, as he would thereby have been dispunishable of waste. That the lands were directed to be limited, after the death of Sir John and his Lady, to the use of the heirs male of the body of Sir John, on the body of the said Jane to be begotten, and to the heirs male of the body of such heirs male issuing; so that the first words were only a description of the persons who were to take, viz. the first and other sons; and the subsequent words declared what estate they were to take, viz. to the heirs male of their bodies.

Mr. Peere Williams, who was counsel for the appellant, says, the matter was greatly debated by the Lord Chancellor and Lord Nottingham for the decree, and the Lords Trevor and Harcourt against it; but at length the decree was affirmed without any division.

Streatfield v. Streatfield, MSS. R. 176.

34. Thomas Streatfield, by articles previous to his marriage, agreed to settle lands to the use of himself and Martha his intended wife, for their lives, and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said Thomas, on his wife begotten, with other remainders over. The marriage soon after took effect, and the husband by deed, reciting the articles, settled the lands to the use of himself and his wife for their lives,

and the life of the longest liver of them, and after their decease, to the use of the heirs of the body of the said Thomas on the said Martha to be begotten, and for want of such issue, remainder to the right heirs of Thomas. The question was, whether this settlement was a proper execution of the articles. Lord Talbot held, that the settlement was not a proper execution of the articles. He said, it could not be doubted but that upon application to the Court of Chancery, for the carrying into execution the articles, the Court would have decreed it to be done in the strictest manner; and would never leave it in the husband's power, to defeat and annul every thing he had been doing; and the nature of the provision was strong enough for that purpose, without any express words. Cusack v. Cusack, 5 Bro. Parl. Ca. 116.

35. The same rule has been adopted in the construction of articles for settling the wife's estate; and the words heirs of the body of the wife, by the intended husband, have been construed to mean first and other sons.

36. Upon a marriage, articles were entered into, whereby it was agreed, that the wife's portion should be laid out in the purchase of lands, which should be settled on the husband and wife, for their lives, and the life of the longer liver of them; and after, to the heirs of the body of the wife, by the husband to be begotten. Yet the Master of the Rolls (Sir J. Trevor) decreed the settlement to be to the first and other sons, &c., so as the husband and wife might not have power to bar the issue. Jones v. Laughton, 1 Ab. Eq. 392.

37. Mr. Fearne observes, that in the above cases, the limitation in the articles importing an estate tail, either in that parent from whom the estate moved, or in both the parents, would have put it in the power Cont. Rem. 131.

either of the father alone, during the coverture, or of the settling parent alone, after the death of the other, to bar the issue; and that power would not have been restrained to the concurrence of both parents. But he had not met with any case in which the same doctrine had been extended to a limitation giving an estate tail to the wife alone, in the estate moving from the husband. There rather seemed to have been a distinction taken between that and the other cases, in respect of its not leaving it in the power of either of the parents, alone, to bar the issue, either during or after the coverture; for in such case, as the husband takes no estate tail, it is evident he cannot during the coverture, or afterwards, bar the issue of the marriage: and the wife of course cannot, during the coverture, do it, without his concurrence; and her estate tail being *ex provisione viri*, the statute 11 Hen. VII. c. 20. prevents her from doing it afterwards; and it has been held, that their power of doing it jointly is not unreasonable, or inconsistent with the probable view and intent of the settlement.

Vide Fit. 36. c. 1.

Power v. Power, 1 P. Wms. 453.

38. Thus, where articles were made before and in consideration of marriage, whereby lands were agreed to be settled to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body of the wife, by the husband begotten, remainder to the husband in fee; Lord Cowper said, they were prudent articles; and the wife, though she was to have an estate tail thereby, yet could not bar it, it being restrained by the statute 11 Hen. VII.; and it was plainly intended that the father should not have a power of defeating and starving the issue. It was therefore decreed, that the estate should be settled as by the articles, namely, to the father for life, remainder to the eldest son in tail.

39. On a bill by a mortgagee, to redeem or foreclose, the defendant insisted that by articles, previous to the marriage of his father and mother, they agreed to purchase lands of a certain value, and to settle them to the use of the husband for life, remainder to the wife for life, remainder to the use of the heirs of the body of the wife by the husband, remainder to the heirs of the survivor. Lands were purchased and the husband and wife joined in a recovery of them, to the use of the plaintiff in fee, by way of mortgage. The defendant insisted, that his mother being dead, he was entitled, under the true construction of these articles, in equity, to have this estate settled to the first and other sons of the marriage in tail male. Sir Joseph Jekyll held, that if this was a common limitation, he should have thought what the defendant insisted on right, and that the mortgagee must have lost his estate: but this was particular, to the heirs of the body of the wife by the husband; and being *ex provisione viri*, would secure the children against the father alone; and that it might be the real intent that both might bar, and therefore the defendant was well barred.

Whately v. Kemp, cited 2 Ves. 358.

2 Atk. 477.

40. Francis Highway, by articles previous to his marriage, covenanted to surrender customary lands of inheritance, to the use of himself for life, remainder to his intended wife for life, and from and after the decease of the husband and wife, to the use of the heirs of her body by him, if he survived her; but if she survived him, to the heirs of his body, on her body to be begotten; remainder to his own right heirs. The marriage took effect; and the husband surrendered the estate to the uses mentioned in the marriage articles, and was admitted accordingly: and, at the same court, he and his wife surrendered

Highway v. Banner, 1 Bro. Rep. 584. 2d edit.

the estate to the use of the husband and wife for their joint lives, and the life of the survivor, and after their deaths, to the use of their eldest son for life, and after his death, to his first son who should live to attain 21, and his heirs for ever.

Upon a question, whether the first surrender to the uses mentioned in the articles was a due execution of them; the Master of the Rolls (Sir L. Kenyon) said, it had been long settled that articles for a settlement on a husband and the heirs of his body, should be carried into execution as a strict settlement; and it had been considered as vain to make a settlement, which instantly might be defeated by a recovery. But the doctrine had never gone so far, where that party could not suffer a recovery alone. He said he did not know that the point had been decided; he must therefore decide as reason, and the principles of the cases decided, led him. He observed, that it was anciently a common mode of settlement, to the husband for life, to the wife for life, and to the heirs of the body of the wife by the husband: it was thought a sufficient precaution to preserve the intail, that it could not be destroyed, unless both husband and wife concurred; and it was thought better that the power should be given to the two parents concurring, than that the property should be absolutely tied up. With respect to the case before him, the limitation appeared to be anxiously worded: the concurrence of both parties was necessary to destroy the entail; whichever survived, it was out of the power of the survivor. He thought he had no authority to say, that this was not what the parties meant; that he could not put on the articles the construction contended for by the defendants; and declared that
7 Ves. 390. the articles were properly carried into execution by the first surrender.

41. Where there has been a difference between two sets of limitations on the face of the articles, that evidenced a distinction in the intention of the parties themselves, between a strict settlement on the issue of the marriage, and an entail on the parent; by expressly securing a provision for such issue, under a limitation of one fund or estate in the way of strict settlement; and at the same time limiting another estate in a more general way to the heirs of the body of the father; the Court has thought that there was not sufficient ground for executing the latter limitation in strict settlement. Fearne Cont. Rem. 135.

42. By marriage articles, it was agreed that 6,000 *l.* in the hands of trustees, should be laid out in the purchase of lands, to be settled on the husband for life, remainder to the wife for life, for her jointure, remainder to the first and other sons of that marriage in tail male successively, chargeable with 2,000 *l.* for younger children, remainder to the husband in fee. The father of the husband, by the same articles, covenanted to settle other lands, after his own decease, upon the husband and the heirs male of his body, remainder to the heirs of his father. The husband's father having made a settlement of the lands, agreed to be settled by the articles, on the husband and the heirs male of his body, with remainder to himself in fee, one point was, whether this was a good performance of the agreement, and if the limitation ought not to have been to the husband for life, with remainder to his first and other sons in tail male successively, in strict settlement. Chambers v. Chambers, 2 Ab. Eq. 35.

Lord King held that the settlement made by the father was a good execution of the agreement, and confirmed it. He said, that by the articles these lands were not intended to be settled as a provision

for the children of that marriage (they were taken care of by the other part of the articles, by the trust money), but for the support and provision of the husband; and it was not like the common case of articles for a settlement on the marriage, where no other provision or care was taken for them: and the different manner of penning the articles, in relation to the trust money, and to these lands; the one to be in strict settlement, to the first and other sons of the marriage, the other limitation to the husband and the heirs male of his body generally, and not tied up to the issue of that marriage; showed plainly the parties understood and had in contemplation the difference between a strict settlement upon the issue of that marriage, and a general settlement upon the husband and the heirs male of his body.

Howell v. Howell, 2 Ves. 358.

43. The Court of Chancery will put the same construction on the words heirs female, in favour of daughters, as it does on the words heirs male, in favour of sons.

West v. Erisey, 2 P. Wms. 349. 1 Bro. Parl. Ca. 225.

44. By articles, in consideration of an intended marriage, it was agreed that the husband should settle his estate, to the use of himself for life, without impeachment of waste, remainder to the intended wife for life, remainder to the heirs male of the husband by the said intended wife, remainder to the heirs male of the husband by any other wife, remainder to the heirs female of the husband. The marriage took effect, and there was issue one daughter. The husband suffered a recovery and sold the lands. Upon a bill by the two daughters of the daughter, they insisted that the estate ought to have been limited in strict settlement, to the sons of the husband, with remainder to the daughters of the marriage. The bill was dismissed.

An appeal was brought in the House of Lords, where it was contended, that by the marriage articles it was agreed that the estate should be limited to the husband for life, *sans waste*, and that he should have power to make leases, which was a plain evidence that the estate was intended to be limited in strict settlement, and that the husband should be but tenant for life, and have no power to bar either his sons or daughters by fine or recovery. That it was objected, that though courts of equity had in like cases decreed an execution of marriage articles, in strict settlement, in favour of sons, yet they had not extended it in favour of daughters, who were most commonly provided for by a term of years, to raise portions for them, in case of failure of issue male: but to this it might be answered, that the reason seemed to be as strong, that the expression of heirs female of the body, contradistinguished from sons, in marriage articles, should have the same construction in favour of daughters, as the expression of heirs male in favour of sons. That in this case both were under the contemplation of the parties, because there was no other provision for daughters, besides the limitation intended for them by the articles; and according to the common course, where provision was made for daughters by a term of years, it was always so limited, as to be out of the father's power to bar it.

On the other side it was contended, that there was no precedent of a court of equity having interposed, to carry articles into strict settlement, in favour of heirs female in any case; and much less in a case of this nature, where part of the consideration was the continuance of the husband's name, which could not subsist long in females; and where the remainder limited to them was to commence after failure of issue

male of the husband by any other wife, and consequently after an estate tail in him; which remainder was of no account in the law, as being subject to be barred by the tenant in tail in possession.

The decree was reversed, and it was ordered and adjudged, that the lands contained in the marriage articles should be conveyed to the two granddaughters, and to the heirs of their bodies, as tenants in common, with cross remainders.

2 Ves. 239.

45. In a subsequent case, a limitation to the heirs of the body of the husband, with an express pecuniary provision for the daughters, was held not to be equivalent to a limitation to heirs female.

Powell v. Price, 2 P. Wms. 536.

46. Thus, where in consideration of a marriage, and of 5,000*l.* portion, articles were entered into, whereby the intended husband, for making provision for the issue of that marriage, covenanted with the wife's trustees, to convey certain estates, to the use of himself for life, without waste, remainder to trustees to preserve contingent remainders; remainder, as to part, to the wife for her jointure; remainder, as to the whole, to the first and other sons of the marriage, in tail male successively; remainder to the heirs male of the body of the husband, (that is, by any wife); remainder to the heirs of his body by his said wife; and for want of such issue, to his own right heirs. In which articles there was a clause empowering the husband and wife to make leases at the old rent; and also a clause, that if the husband should die without issue male by his said wife, and there should be daughters, if but one daughter, then such daughter should have 3,000*l.*, and if more daughters than one, 4,000*l.* among them, to be secured upon some part of the estate. There was but one daughter of the marriage. The husband survived his wife,

and suffered a recovery of the lands; and made another settlement of them on his second marriage, subject, as to part, to a trust for raising 3,000*l.* for his daughter by his first wife, in satisfaction for the portion she was entitled to under the first articles; and maintenance for her in the mean time. The question was, whether this being in case of articles, should not be taken as if the limitation had been, to the daughters of the husband, by his first wife; for then they could not be barred by the recovery.

It was insisted, on behalf of the daughter, that the issue of the marriage, and consequently the daughter, were purchasers, in consideration of the marriage, and the mother's portion. That the limitation to the heirs of the body of the husband, by his first wife, being by way of articles, must be the same as if it had been to the daughters; for it could not be intended in favour of the sons of that marriage, there being an express limitation before to them; and though, if this had been in a settlement, there being a precedent limitation for life to the husband, it would have been an estate tail in him, and barrable by a common recovery, yet it was otherwise where it rested upon articles; for in that case, an express estate for life being limited to the husband, as in this case, such express estate excluded the raising or vesting of any different estate in him, by virtue of any limitation to the heirs of his body. On the other side it was said and resolved, that though here was notice of the marriage articles, yet the 3,000*l.* secured by the settlement on the second marriage, was an actual satisfaction of all demands by these articles: and though a limitation by articles to the heirs male of the marriage, after an express estate for life to the father, should be taken to mean a remainder to the

first and other sons, it did not follow that such a limitation to the heirs of the body, must be equivalent to a remainder limited to daughters; especially in this case, where they were postponed to the limitation to the heirs male of the body of the husband, by any wife; and where there was an express pecuniary provision made for the daughters by the first wife; which was all the said daughters were to depend upon. As to the case of West v. Erisey, there was this diversity. In that case, no portion was provided for the daughters of the first marriage; in the present case portions in all events were secured to such daughters. In West v. Erisey, the remainder was to the heirs female of the body of the husband by the first wife, so that the daughters were more immediately in the view and contemplation of the parties in that, than in the present case. Decreed, that the daughter was not entitled to the premises, by virtue of the limitation in the marriage articles, to the heirs of the body of the husband, by the first wife.

ante, § 44.

Vide Fearne Cont. Rem. 147.

47. As the word issue equally comprehends male and female children, an agreement to settle lands on the issue of the marriage, has been held to extend to daughters.

Hart v. Middlehurst, 3 Atk. 371.

48. By articles in consideration of marriage, the intended husband covenanted to convey lands to trustees, in trust for himself for life, remainder to his wife for life, and after the determination of these estates, then to the issue of this match, in such sort, manner, and form, and subject to such charges for younger children, as the husband should thereafter by deed or will appoint. Lord Hardwicke said, the word issue meant issue female as well as male; and therefore if it had gone no farther than to the issue of the marriage, and a bill had been brought for carrying

the articles into execution, the settlement must have been to all the issue; to the first and every other son; and for default of such issue, to the daughters, with proper remainders following one after another. He had known several decrees of this kind upon the words, issue of the marriage. But then the subsequent words—"In such sort, manner, and form, and subject to such charges for the younger children, as the husband should thereafter, by deed or will, order and appoint," were relied on by the defendant; and it had been insisted that this left a power in the father, as to the manner and quantity of interest the children should take out of the estate. He agreed that it did, as to the manner, but not as to the interest.

Dodd v. Dodd, Amb. 274. Vide Fearne, Id. 152.

49. In the preceding cases, there were articles only, and no settlement previous to the marriage; and the Court was required to carry the articles into execution; or to rectify the settlement made after the marriage, in consequence of the articles. But there are also instances where there were both articles, and a settlement expressly in pursuance thereof, made previous to the marriage; and the Court, upon an application for that purpose, has interfered to rectify such settlement, in conformity to the nature, or constructive import of the limitations in the articles.

Settlements in pursuance of Articles rectified.

50. Thus, in the case of Honor v. Honor, a settlement was made before the marriage, reciting the articles, and expressed to be made in pursuance thereof, whereby the lands were limited to the husband for life, remainder to the wife for life, remainder to the heirs of the body of the husband, on the wife to be begotten. Lord Cowper said, it was a plain mistake, in making the settlement vary from the articles; for the settlement being said to be made in

ante, §38.

pursuance thereto, showed there was no alteration of the intention, nor any new agreement, between the making of the articles, and the settlement. Therefore, decreed a conveyance of the lands to the father for life, remainder to the plaintiff, the son, in tail.

ante, § 44.

51. So in the case of West v. Erisey, a settlement was made before the marriage, mentioned to be in pursuance and performance of the articles, by which, after the limitation to the first and other sons of the husband by any other wife, the lands were limited to the heirs of the body of the husband by the wife. And it was ordered by the House of Lords, that the lands should be conveyed to the grand-daughters, in the manner already stated.

Roberts v. Kingsley, 1 Ves. 238.

52. By articles before marriage, an estate was agreed to be settled on the husband for life, remainder to the heirs male of his body, with power to raise portions for younger children. A settlement was afterwards made, also before marriage, in pursuance of the articles; and observing the very words of the articles. The husband levied a fine, and declared the uses to himself in fee. The son brought a bill to have the settlement rectified, according to the intention of the articles, which was, to make his father tenant for life only, although the words both of the articles and settlement, in construction of law, made him tenant in tail. Before marriage, indeed, the parties might come to a new agreement, but the settlement itself being in pursuance of the articles, excluded any such notion.

Lord Hardwicke said, this was the common case, the variation from the intent of the articles, and from the ordinary course of settlements, not arising from any new agreement (being made in pursuance of

the articles), or fraud; but from mistake in not attending to a strict settlement; the reason of which was unanswerable, viz. that on a settlement for valuable consideration, to make the father tenant in tail, would be nugatory, and the same as making him tenant in fee; therefore the son was entitled to relief, and to have the settlement rectified according to the true intent of the articles.

53. But where both articles and settlement are previous to marriage, at a time when all parties are at liberty, and the settlement is not expressed to be made in pursuance and performance of the articles; there, if the settlement differs from the articles, it will be considered as a new agreement between the parties, and will control the articles. Legg v. Goldwire, Forrest, R. 20.

54. It should however be observed, that the Court of Chancery will not, in those cases, relieve against purchasers for a valuable consideration, and without notice. As in the case of West v. Erisey, where one of the objections to the appeal was, that if the articles should be allowed to control the settlement, the purchasers under the husband would be affected. To which it was answered, that the appellant's bill was not brought against any purchaser, as to the parts of the estate sold by the husband; since the appellants only prayed satisfaction out of his personal estate; and the decree was according to such prayer, and did not affect the purchasers. Except in the Case of Purchasers.

55. So in the case of Powell v. Price, it was admitted, that if the trustees under the settlement, or the second wife, had had no notice of the articles made on the first marriage, then their being purchasers without notice would have been a bar to the plaintiff's claim, by the articles. ante, § 46. Warwick v. Warwick, 3 Atk. 291.

showed that the children should all take their several shares.

But is now applied. Ex. Dev. 302. 4th edit.

60. Mr. Fearne observes, that in the cases of Peacock v. Spooner, and Dafforn v. Goodman, no particular expressions determined the intent to be that the heirs of the body should take as purchasers. But these being cases of marriage settlement, it was reasonably enough inferred that the issue of the marriage were intended objects of the settlement, and the term not designed to vest wholly in the mother. But in subsequent cases, the words heirs of the body were held to be words of limitation.

Webb v. Webb, 1 P. Wms. 132.

61. Edward Webb, the defendant's grandfather, in consideration of a marriage between Thomas his son, and Anne his then wife, and 350*l.* portion, assigned divers lands to trustees for the remainder of a term of 1000 years, upon trust to permit the son to enjoy the same so long as he should live, and after his decease, then to Anne his wife as long as she should live, and after their decease, to permit the heirs of the bodies of the said Thomas the son and Anne his wife to be begotten, to hold the premises during the remainder of the term; and for want of such issue, to be enjoyed by the right heirs of the said Thomas the son. Thomas and Anne had several children; and he having survived his wife, and settled about two thirds of his estate on the defendant, his eldest son, and being indebted about 300*l.*, made a mortgage of the premises for securing that money; and in order thereunto took out administration to the surviving trustee, and afterwards assigned the term to the plaintiffs, upon trust to sell the same, and pay off the mortgage. The plaintiffs, the trustees, being disturbed by the defendant (the eldest son), brought their bill for the execution of the said

trust. The defendant, by his answer, set forth the first deed of trust, and insisted that he, as eldest son and heir of his father and mother, was entitled to the premises, by virtue of that settlement. The cause was heard before the Master of the Rolls (Sir John Trevor), who dismissed the plaintiff's bill.

Upon a petition to Lord Keeper Harcourt, it was reheard by him; he said, he never heard, before the case of Peacock v. Spooner, that the limitations of a term in equity, differed from the case of a freehold at common law; and as that case differed from this in several material circumstances, he thought himself at liberty to determine this as if the case of Peacock v. Spooner was out of the way; and reversed the decree.

Hayter v. Rod, Tit. 8. c. 2. § 28.

62. A term was vested in trustees, by a voluntary deed, in trust to pay the profits to Sarah Sharp during her life, and immediately after her decease, to the heirs of the body of Sarah, lawfully to be begotten, if the term should so long endure; and for default of such issue, to the grand-daughter of the settlor. Lord Hardwicke was of opinion that the whole trust of the term vested in Sarah Sharp.

Thubridge v. Kilburn, 2 Ves. 233.

63. Notwithstanding the authority of the two preceding cases, there have been other determinations, in which the Court of Chancery, proceeding entirely upon circumstances of evidence of intention, have held the words, heirs of the body, to be words of purchase.

Unless a contrary Intention appear.

64. Edward Bussey being possessed of a term for 59 years, by voluntary deed, conveyed it to trustees, in trust to permit Grace Bussey his wife to receive the rents and profits for the said term of 59 years, if she should so long live, and after her decease, to the use of the said Edward for life, and after the decease of Edward and Grace, then in trust for the

Hodsol v. Bussey, 2 Atk. 89.

heirs of the body of the said Grace by the said Edward, and to their executors, administrators, and assigns, for the residue of the said term; and for want of such issue, &c. Lord Hardwicke was of opinion that the whole did not vest in Grace, the words not being words of limitation, but of purchase; and that they might, from the circumstances of the case, be considered as words of purchase, appeared from Archer's case, where the superadded words of limitation made the word heir a word of purchase.

Tit. 38. c. 14.

Price v. Price, 2 Ves. 234.

65. A person on his marriage settled a leasehold estate to trustees, to the sole and separate use of his intended wife for life, for her jointure; and from and after her decease, to the use of the heirs of the body of the wife, by the husband to be begotten; and for want of such issue, to the use of the husband and his heirs for ever. Sir Joseph Jekyll held, that on the wife's death, the leasehold vested in the heirs of her body, as purchasers

Sands v. Dixwell, cited 2 Ves. 652.

TITLE XXXII.

DEED.

CHAP. XXIII.

Construction.—Of Perpetuities.

1. *Perpetuities discouraged.*
7. *History of Settlements.*
11. *Settlements of Estates for Life.*
12. *Of Terms for Years.*
18. *Alienation may be restrained during Lives in being and 21 Years after.*
21. *This Rule applied to springing and shifting Uses.*
25. *And to Uses arising from Appointments.*
28. *And to Declarations of Trust of Terms for Years.*
29. *But not to Remainders after Estates Tail.*
31. *An unborn Person may be made Tenant for Life.*
33. *And a vested Remainder limited on that Estate.*
34. *But no Estate can be limited to the Issue of an unborn Person.*
35. *Perpetuities created by Act of Parliament.*

Section 1.

WE have seen that by the introduction of the feudal law into England, all real property was rendered unalienable; but by degrees the proprietors of land acquired a power to dispose of it; which was found to be so beneficial to the country, that the Judges have, for many centuries, established it as a rule, that real property should in no case be rendered perpetually unalienable; or, as it is usually expressed, that perpetuities should not be allowed. And this rule being founded on principles of general policy, is adopted by the courts of equity, in as full an extent as by the courts of law.

Perpetuities discouraged, ante, c. 1.

3 Cha. Ca. 31.
1 Vern. 164.

Tit. 1. § 53. 2. Thus it has been stated, that an unlimited power of alienation is an incident so inseparably annexed to an estate in fee simple, that it cannot be restrained by any proviso or condition whatever.

Tit. 2. c. 1. 3. The statute *De Donis* was procured by the nobility for the purpose of rendering their possessions Tit. 35 & 36. unalienable. But the Judges, by means of common recoveries, and by their construction of the statutes of fines, effectually defeated the operation of this statute; and also laid it down as a rule, that a tenant in tail cannot be restrained from barring his estate by those assurances.

4. Any other mode of restraining a tenant in tail from alienation will also be deemed void, as tending to a perpetuity.

King v. Burchell, Amb. 379. 5. John Blunt devised real estates to his cousin John Harris for life, remainder to the issue male of John Harris, and to his and their heirs, share and share alike; and for want of such issue, to the issue female of J. Harris, and her and their heirs; remainder over: with a proviso, that if J. Harris, or his issue, should alienate, mortgage, or incumber, or commit any act or deed whereby to alter, change, charge, or defeat the said bequests, they should pay 2,000*l.* to the person who ought to take next by means of the said limitations. John Harris having two daughters, he and they joined in suffering a recovery.

Lord Keeper Henley, after taking time to consider, delivered his opinion, that John Harris took an estate tail; and that the proviso was repugnant to the estate.

Mainwaring v. Baxter, 5 Ves. Jun. 458. 6. Lands were limited by deed to trustees and their heirs, to hold to the use of them, their heirs and assigns for ever, in trust to the use of Charles Mainwaring (the settlor) for life, and after his decease, to

the use of trustees for 1,000 years, subject to the uses, trusts, and conditions after mentioned; and after the determination of that term, to the use of Sir H. Mainwaring for 99 years, if he should so long live; and after the determination of that estate, to trustees during his life, to preserve contingent remainders; remainder to his first and other sons in tail male; with several remainders over; with a declaration that the term of 1,000 years was so limited, to the intent and purpose that all and every the person and persons, other than Charles Mainwaring, on or to whom any estate or interest in the said premises was thereby before settled or intended, might be content to accept the same in such manner as the same was in and by the said indenture before limited and appointed; and that it should not be in the power of them or any of them to anticipate, prevent, or destroy the trust estate or benefit of him or them appointed to succeed. And it was declared, that the trustees, their executors, &c. should or might, after any contract or agreement made touching alienation of the said premises, or any part thereof, but before any alienation should be actually made, or any act, matter, or thing done which might amount or be construed to prevent the said premises, or the trust thereof, from going, remaining, coming, or being according to the limitations aforesaid, by sale or mortgage of all the said premises, for and during the remainder of so much of the same term as should be then to come, or of a competent part thereof, raise the sum of 5,000 *l.* &c. and pay the same unto such person or persons respectively as would from time to time be entitled to the premises, in case such person or persons, contracting to alien the premises, were actually dead.

A person who was tenant in tail under this settlement, having suffered an equitable recovery, to the use of himself and his heirs, filed his bill in Chancery, praying that he might be declared entitled to the legal estate, discharged of the trusts of the term, and a conveyance thereof.

The Master of the Rolls (Sir R. P. Arden) said it was a mere device to prevent alienation; which
infra. was attempted in the Duke of Marlborough's case, upon very great advice; and the House of Lords had no difficulty in affirming Lord Northington's decree. He should therefore adopt the words of Lord Northington in that case. Declare the trusts of the term of 1,000 years, as tending to a perpetuity, and being inconsistent with the rights of the several persons to whom estates in tail are limited by the said deed, to be void, and of no effect. *

History of Settlements.

7. Although public policy has long been averse from perpetuities, yet the general propensity of individuals to preserve their acquisitions in their own families, as long as the law would admit, induced them to adopt various modes of preserving their estates in their families, by preventing their immediate descendants from alienating them. This produced what, in modern language, are called
Tit. 2. c. 1. § 1. settlements. The first of these was effected by the
1 Inst. 290 *b*. n. 1. § 3. creation of a conditional fee, which had two effects: 1. Of suspending the power of alienation till the birth of issue. 2. Of preserving the inheritance in a particular line. When these estates were converted into estates tail by the statute *De Donis*, a simple

* It has been stated that a Condition of Non-alienation may be inserted in a Lease for Life or Years. Tit. 13. c. 1. § 33.

entail of the land was sufficient to preserve it in the family of the settlor. But upon the introduction of fines and recoveries, settlements of this kind were found to be ineffectual, being barrable by the first tenant in tail.

8. When women seised of estates tail of the gift of their husbands were prohibited by the statute 11 Hen. VII. c. 20. from alienating them; and husbands seised in right of their wives were prohibited by the statute 32 Hen. VIII. c. 28. from alienating them; it became usual to limit the husband's estate to the husband and wife, and the heirs of the body of the wife by the husband; and to limit the wife's estate to the husband and wife, and the heirs of the husband by the wife; by which means the estate was secured to the parents, during their lives, and to the issue, against the act of either parent; for nothing but the concurrent act of both parents could deprive the issue of the estate; while there was a provision for unforeseen events, by their co-operation during their joint lives. During the life of the surviving parent, the same effects might be produced by the co-operation of that parent and the issue. And after the decease of both the parents, the estate was restored to the issue, with a complete power of alienation.

Tit. 36. c. 10.

Highway v. Banner, ante, c. 22. § 40.

9. The last mode of settlements was by limiting estates for life to all the persons then in being, with remainders to their children by purchase. This was however subject to one inconvenience; for the tenants for life might bar the remainders to their children by the destruction of their estates; but the invention of trustees to preserve contingent remainders, of which an account has been already given, proved an effectual remedy to this abuse. From that time

Tit. 16. c. 6.

Idem, c. 7.

the usual mode of settlements upon marriage has been, by a limitation of the estate to the intended husband for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the marriage, severally in tail, remainder over: by this means the estate is rendered unalienable till the eldest son of the marriage attains the age of 21, when he can join with his father in suffering a common recovery, by which the estate tail limited to the eldest son, and all the subsequent remainders are barred, and a new estate in fee simple is acquired.

Tit. 16. c. 7. § 10.

10. Another mode of protracting the power of alienation was invented long after, by limiting the estate to the intended husband for 99 years if he should so long live, and vesting the freehold in trustees during his life, upon which there was a limitation to the first and other sons of the marriage severally in tail; by which means the power of barring the entail was in general protracted till the death of the father. But this kind of settlement is now generally disused.

Settlements of Estates for Life. Tit. 3. c. 1. § 11 & 12.

11. Although estates for life are not capable of being entailed, yet they may be so settled, as to answer the purposes of an entail; and be rendered unalienable almost for as long a time as estates of inheritance. Thus an estate for life or lives may be limited to a person for life, remainder to his first and other sons, severally in tail; and such a settlement can only be barred, when the eldest son attains the age of 21 years.

Of Terms for Years. Tit. 8. c. 2. § 20.

12. Terms for years are also incapable of being entailed, because that would tend to a perpetuity. But still terms for years may be settled by deed or trust, as effectually as estates of inheritance. Thus

a declaration of the trust of a term for A. for so many years of the term as he shall live, and from his decease upon trust for his first and other sons severally, and the heirs of their bodies, is good; and A. will only take an estate for his life. But in such case the first son who is born takes the absolute interest in the term; if such first son should die immediately after his birth, his interest in the term will vest in his father, if alive, as his next of kin: and if there are several successive tenants for life, with remainder to their several sons, and the heirs of their bodies; if any of the tenants for life have a son, the whole reversionary interest will vest in such son, subject to the preceding estates for life, and the contingency of the preceding tenants for life having sons; and will, on the death of such son, go to his father, though one of the tenants for life, as his next of kin, upon the father's taking out letters of administration to his son; in prejudice of all persons claiming under the subsequent limitations.

13. John Duke of Newcastle, being possessed of divers lands and tenements, held by lease from the Crown for 99 years, devised all his estates, as well leasehold as freehold, to Thomas Lord Pelham for life, remainder to his first and other sons in tail male, remainder to Henry Pelham for life, remainder to his first and other sons in tail male, remainder to William Vane for life, remainder to his first and other sons in tail male, remainder over. Thomas Lord Pelham, who afterwards became Duke of Newcastle, never had a son; but Henry Pelham had two sons, both of whom died in his lifetime, viz. Thomas and Henry. Thomas the eldest, being the person in whom the first estate tail, in the order of limitation, was vested, by virtue of the will. Henry Pelham soon afterwards

Pelham v. Gregory, 3 Bro. Parl. Ca. 204.

died, having made his will, and appointed Richard Arundel and H. Perkins his executors; and letters of administration of the personal estate of Thomas Pelham the infant, were also granted to the said R. Arundel. William Vane had issue two sons, Christopher the eldest, who died an infant without issue, and William his second son. This William, who became Lord Vane, took out letters of administration to his brother Christopher, and thereby became entitled to all such interest in the leasehold premises as vested in his brother Christopher, who was the first person in *esse*, in point of time, who took any estate of inheritance in the freehold premises. Arundel and Perkins filed their bill against Lord Vane and others, stating the above facts, and that they, as executors of the said Henry Pelham, and as administrators of the personal estate of Thomas Pelham, the infant son of Henry Pelham, were become entitled to the absolute interest in the leasehold terms, subject to the life estate of Thomas Duke of Newcastle, and the contingency of his having a son born alive; and being so entitled, they had entered into an agreement with George Gregory for the sale of those terms, and prayed that the agreement might be performed specifically, and carried into execution.

Lord Vane put in his answer, insisting that his brother Christopher was the first person, in point of time, in *esse*, who took any estate of inheritance in the premises; and that he dying an infant and without issue, Lord Vane, as the only son and surviving heir of his father William Vane, became the first person in *esse* who took an estate of inheritance in any of the premises, by virtue of the limitations in the will; and denied that the absolute estate and interest in the leaseholds ever vested in Thomas Pelham.

The cause was heard before Lord Keeper Henley, who dismised the bill.

On an appeal to the House of Lords, the following questions were put to the Judges:—1°. Whether the property of the leasehold estates for years, devised by the will of the Duke of Newcastle, vested in Thomas Pelham the infant son of Henry Pelham deceased, subject to the Duke of Newcastle's interest therein for his life, and to the contingency of the Duke's having a son? 2°: Whether the property of the said leasehold estates, subject as aforesaid, was transmitted to the representatives of the said Thomas Pelham the infant?

The Lord Ch. Baron of the Exchequer and Mr. Justice Denison being present, the Lord Ch. Baron delivered their concurrent opinion upon the said two questions in the affirmative. Whereupon it was ordered that the decree should be reversed; and that the leasehold estates for years devised by the will of the late Duke of Newcastle, subject to the then present Duke's interest therein for his life, and defeasible by the said Duke's having a son, belonged to the appellants, as standing in the place of the said Thomas Pelham, the infant son of Henry Pelham deceased; and that the agreement entered into between them and George Gregory, for the sale of them, ought to be carried into execution.

Vide Foley v. Burnell, 4 Bro. Parl. Ca. 319.

14. To remedy this inconvenience, it has been the practice of conveyancers, since the time of Sir Orlando Bridgeman, to insert a clause in the deed, declaring, that if the first son shall die without issue, under the age of 21 years, the term for years shall vest in the second son; subject to the same proviso in favour of all the other sons. And the validity of this mode of limitation was established by Lord Keeper North, in

conformity to the opinion of the Judges of the Court of C. P., as being within the period allowed for the vesting of an executory estate, in the case of Massenburg v. Ash, and several other cases, which will be stated in a subsequent title.

Tit. 38. c. 19.

2 P. Wms. 689.

15. In the case of Stanley v. Leigh, Sir J. Jekyll said, he had informed himself of the common course of settling terms for years, and found it usual in marriage settlements to limit them thus: To trustees for the whole term, in trust to permit the husband and wife, and the survivor, to receive the rents and profits during so long of the term as they should live; and after the death of the survivor, to permit the first son of the marriage to receive the rents and profits till he attained 21; and if he attained that age, then the trustees to assign the residue of the term to him: but if such first son died under 21, then in trust for the second and other sons, in like manner.

Gower v. Grosvenor, Barnad. R. 54.

16. In a settlement, by which freehold estates were limited to the husband for life, with remainder to his first and other sons in tail; a covenant was inserted to assign terms for years to trustees, for such persons, estates, intents and purposes, as were mentioned concerning the freeholds, or as far as the law would in that case allow or permit. And the Court of Chancery directed such terms for years to be limited in the manner above mentioned.

Newcastle v. Lincoln, 3 Ves. 387.

17. Upon the marriage of Henry Earl of Lincoln in 1772, he joined his father, Henry Duke of Newcastle, in settling several freehold manors, &c. to the use of the Duke for life, remainder to Lord Lincoln for life, remainder to his first and other sons in tail male, remainder to his next brother Lord Thomas Clinton for life, remainder to his first and other sons in tail male, remainder to Lord John Clinton in the

same manner. And the Duke covenanted that he would assign to the trustees of the settlement the manor of Newark, which he held by a lease for years from the Crown; to hold the same in trust for, and for the benefit of such person and persons, and for such or the like estate or estates, and for such and the like ends, intents, and purposes, as were therein-before mentioned of and concerning the said manors, &c. thereby granted and released, *as far as the law would in that case allow or permit.*

Henry Earl of Lincoln died in the lifetime of his father, leaving a son and a daughter; and the son died an infant in the lifetime of the Duke of Newcastle, who never executed any assignment of the leaseholds, pursuant to the covenant.

On the death of Henry Duke of Newcastle, Lord Thomas Clinton succeeded him, and died in 1795, leaving Henry his eldest son, and Thomas his second son, infants: who filed their bill against Lady Lincoln, the widow of Henry Earl of Lincoln, who had taken out administration to her infant son; stating, that Lady Lincoln had been permitted to take possession of the said manor of Newark; and praying that the settlement made on the marriage of Lord Lincoln, as far as respected the performance of the covenant to convey the leasehold premises, might be established, and carried into execution; and that it might be referred to one of the Masters to settle a proper conveyance of the same; and that such a clause might be inserted therein, as should prevent the absolute vesting of the said leasehold property, until the persons successively entitled to the possession of the same should have attained the age of 21 years. To this bill Lady Lincoln put in her answer, and thereby insisted that the infant son of Lord Lin-

coln, having survived his father, became entitled to the said leasehold premises, for his own use and benefit; and that, in consequence of his death, and by virtue of the statute of distributions, Lady Lincoln and her daughter became entitled to the said leaseholds.

The case having been fully argued, Lord Loughborough said, the question arose upon the leasehold property at Newark, which, by the articles made upon the marriage, was to be settled in the same manner as the freehold estates, as far as the rules of law would admit. He meant to be extremely short in stating his opinion, which was decidedly that in cases of marriage articles, where leasehold property was to be subject to a settlement of freehold estates, and the limitations of the freehold went to all the sons in succession, the settlement to be made of the leasehold was to be analogous to that of the freehold; so that no child born, and not attaining the age of 21, should, by his birth, acquire a vested interest, to transmit it to his representatives, and thereby defeat the ulterior objects of the articles; which were not decidedly in favour of one son, but equally extended to every son: and that he took, from all the course of the cases, to be the settled rule and established practice. He therefore directed a clause to be inserted in the settlement, that no person should be entitled to the absolute property unless he should attain to the age of 21 years, or die under that age, leaving issue male.

On an appeal to the House of Lords, this decree was affirmed, after a long discussion, of which Mr. Vesey has given a full account.

19 Ves. 217.

Alienation may be restrained during

18. In consequence of the general admission of these modes of settling estates, it became fully esta-

blished, that real property might be rendered unalienable during the existence of a life in being, and 21 years after; that is, till the son of a tenant for life attained his full age. From one life the courts gradually proceeded to several lives in being at the same time; for this, in fact, only amounted to the life of the survivor; and as it might happen that a tenant for life, to whose unborn son an estate tail was limited, might die, leaving his wife *ensient*, an allowance has also been made for the time of gestation of a posthumous son.

ing Lives in being, and 21 Years after.

19. It may therefore be now laid down as a general rule of law, that an estate may be rendered unalienable during the existence of a life, or any number of lives in being, and nine months and 21 years after; but that all restraints on alienation which exceed that period are void: and in the case of deeds, all the limitations are also void.

20. It should however be observed, that the term of 21 years was probably adopted, because that is the period which must elapse, before an infant can bar an entail. For Lord Alvanley, in the case of Thelusson v. Woodford, has said, that the period of 21 years had never been considered as a term that might at all events be added to an executory devise or trust. He had only found this *dictum*, that estates might be unalienable for lives in being, and 21 years, merely because a life may be an infant, or *in ventre matris*: therefore he was clearly of opinion, that expression could not be held to mean more than children in the womb at the testator's death.

4 Ves. 337.

21. We have seen that in conveyances deriving their effect from the statute of uses, springing and shifting uses might be created to arise upon, or after a limitation in fee simple. And it having been deter-

This Rule applied to springing and shifting Uses. Tit. 16. c. 5.

mined, that neither a fine nor recovery, or any other act of the first taker, should defeat such springing or shifting use, it became therefore necessary to ascertain the time when such use should become vested: for otherwise uses of this kind might be limited on such remote contingencies, as to create perpetuities. It was therefore established, that if an estate in fee simple was first limited, the event on which it was to change must be such, that it must either take place, or become incapable of taking place, during the existence of one or more life or lives then in being, and nine months and 21 years after; otherwise it will be void, as tending to a perpetuity.

Davies v. Speed, Show. Parl. Ca. 104.

22. Thus, where husband and wife levied a fine of the wife's estate, to the use of the heirs of the body of the husband on the wife begotten, remainder to the use of the right heirs of the husband; the limitation to the heirs of the body of the husband was held to be void as a contingent remainder, for want of a preceding estate of freehold to support it. And Mr. Fearne observes, there was no sort of ground to maintain the validity of the limitation to the right heirs of the husband, as a future use, as it was postponed to a general failure of heirs of the body of the husband by the wife, which was too remote.

Cont. Rem. 429. Ex. Dev. 111.

23. But if there be a limitation of a use to A. and his heirs; with a proviso, limiting the estate to B. if A. dies without issue living at the time of his death; or if A. and B. both die without issue living at the decease of the survivor of them; or if A. has no child who attains the age of 21; or if neither A. nor B. have a child who attains the age of 21; it is a good proviso: for these events are such, that they must happen, or become incapable of happening, within the period above mentioned.

24. In the case of Lloyd v. Carew, Lord Somers dismissed the bill, because the event on which the use was to shift being to take place within one year after the death of persons in being, was too remote; and tended to a perpetuity. But the House of Lords reversed the decree, after hearing the Judges: and ordered, that on payment of 4,000*l.* to Sir Richard Carew, or into the Court of Chancery, for his issue, the appellants, as heirs of Penelope, should be let into possession of the premises in question.

Tit. 16. c. 5. § 31.

Com. Rep. 20.

25. With respect to uses arising from the execution of powers of revocation and appointment, it has been observed, that an appointment operates under the statute of uses, not as a conveyance of the land, but as a substitution of a new use, in the place of a former one, and a designation of the person in whom the new use is to vest. The person taking under a power derives his estate, not from the person executing the power, but under the original conveyance by which the power was created; in the same manner as if the use appointed had been limited to him in such conveyance: from which it follows, that the uses created by an appointment under a power, must be such as would have been good, if limited in the deed by which the power was given.

And to Uses arising from Appointments. ante, c. 16. § 74.

27. John Duke of Marlborough devised all his estates to trustees and their heirs, to the use of his daughter Harriet Countess of Godolphin for life, remainder to Lord Ryalton her eldest son for life, remainder to trustees to preserve contingent remainders; remainder to the first and other sons of Lord Ryalton in tail male; remainder to Lord Robert Spencer, eldest son of his second daughter Anne Countess of Sunderland, for life, remainder to trustees to preserve contingent remainders; remainder to

Spencer v. D. of Marlborough, 3 Bro. Parl. Ca. 232.

his first and other sons in tail male; remainder to Charles Spencer (afterwards Duke of Marlborough) in the same manner: and inserted a clause in his will, empowering his trustees, on the birth of each son of the said Lord Ryalton, Lords Robert and Charles Spencer, to revoke and make void the respective uses limited to their respective sons in tail male; and in lieu thereof, to limit the premises to the use of such sons, for their lives, with immediate remainders to the respective sons of such sons, severally and respectively in tail male. And he gave his household furniture, plate, &c. in the same manner.

Upon an application to the Court of Chancery by the trustees, for further directions in carrying the trusts of the will into execution, a question having arisen touching the power given in the will to revoke the uses limited to the first and other sons in tail, and to limit the premises to the use of such sons for life only; Lord Northington declared, that the clause of revocation and settlement in the will, as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect.

On an appeal from this decree to the House of Lords, it was argued, on behalf of the appellants, that the same policy of the law which will not permit estates to be fixed unalienably in one family for ever, will support and protect the means of preserving them, till they come to that point, at which the mischiefs of a perpetual restraint may commence; the one being as necessary an incitement to industry as the other. It had not then been fixed by any legislative or judicial act or authority. It had indeed been determined, that estates might be made unalienable for the duration of any number of lives in being, and for 21 years beyond; and in some in-

stances still farther; but no judicial determination had said what were the precise bounds, which should in no instance, nor by any means be exceeded. The particular mode of conveyance, though it might be new, or, according to the expression in the law books, of the *tendency* of a limitation to a perpetuity, was not sufficient to render such conveyance or limitation void. The interposition of trustees, to support contingent remainders, was an invention introduced about a century before; an invention which tended greatly to suspend and restrain the powers of alienation; and yet it was then become the established mode of settlement. Every limitation of estates, and every restraint of alienation, had a proportionable tendency, in some sense, to a perpetuity. That if the means made use of in this will, to make part of the Duke of Marlborough's estate accompany the honours and estates fixed in his family, for one succession beyond the common limitations, were regular and according to the course of law, they seemed to introduce no danger of a perpetuity; since the restraint would not go beyond the sons of the several noble persons named in the will; and the immediate descendants of such sons would be tenants in tail, and have a power of alienation. That if the trustees had executed this power upon the birth of the appellants, and the respondent, the duke, it was apprehended that a court of equity would not have interposed to impeach it: and if after an execution of the power, the limitations being to persons in *esse*, though for life only, would have been supported; the neglect of the trustees ought not in equity to prejudice the infant *cestui que trusts*: but it being a power which the trustees were enjoined to execute, the Court should consider it as executed from the

respective times when it ought to have been executed; that was from the birth of the several sons of the respective nominees.

On behalf of the respondent, the Duke of Marlborough, it was contended, that in the ordinary course of family settlements, nothing less than an estate tail was limited to persons not in *esse*: it had been, till then, understood to be the only method of carrying on successive remainders of inheritance, by way of strict settlement, in the families of successive tenants for life, consistently with the rules of law; for if the grantor should, after the first estate of freehold, limit a contingent estate or use for life, to a person unborn, and then follow it with contingent remainders in tail to the sons or children of such unborn tenant for life, such contingent limitations of the inheritance would be void. This arose from the policy of the law against perpetuities, that the vesting of the inheritance or ownership might not be suspended beyond the compass of a life or lives in being, or beyond the age of 21 of the first unborn tenant in tail, during whose infancy the law itself would restrain his power of alienation. That whoever had a vested estate of inheritance in land, was the absolute owner; whether he was tenant in fee simple or tenant in tail, it being equally contrary to the rules of law, to prohibit either from exercising the powers of alienation incident to his estate. Conditions to restrain those powers, generally, were void, as being repugnant to the estate limited; and it was admitted that by the direct legal limitations in a deed, or devises in a will, the grantor or testator could not limit an estate tail to a person unborn, and the heirs of his body, and immediately upon the event of his birth, direct it to cease as to such tenant in tail, and

continue as to his issue. If the law was undoubted, equity must follow it, that the same substantial rules of property might be observed by both jurisdictions. And as the law would not allow the testator, by direct limitations, to turn a contingent remainder-man in tail into a tenant for life, at the very instant of time when the estate tail would vest, with its incident right of alienation; so neither would equity allow him, by way of power of revocation, or rather by way of imperative trust, to enable trustees, as his instruments, to convert the tenant in tail, after his birth, into a tenant for life; which change the author of the trust himself could not effectuate by any proper legal limitations, originally inserted in his will. *Quodcunque prohibetur fieri ex directo, prohibetur et per obliquum.* That if the power given to the trustees to revoke the uses upon the birth of the respondent was allowed to be good, it would have been equally so, had it extended to all future generations, and made the estate for ever unalienable, which would be hardly contended.

After hearing counsel on this appeal, the Judges were ordered to deliver their opinions to the House upon the following question, viz. "Whether, by the rules of law, an estate tail limited to the use of persons unborn, by any deed or will, can, by virtue of any power given by such deed or will to trustees, be revoked upon the births of such persons, and a new estate limited to such persons for their lives respectively, with remainders to the issue of such persons successively in tail male?" And the Lord Chief Justice of the Common Pleas having delivered the unanimous opinion of the Judges in the negative, the decree was affirmed.

And to Declarations of Trust of Terms for Years.

28. The rules respecting perpetuities are as applicable to declarations of trust of terms for years, as to any other conveyances; but the cases on this subject being governed by the same principles as those by which executory devises of terms for years are regu-

Tit. 38. c. 19.

lated, they will be stated under that head.

But not to Remainders after Estates Tail.

29. These rules do not however apply to contingent uses limited upon, or after an estate tail; which may be given so as to take effect at any indefinite period

Tit. 36.

of time: because a common recovery suffered by the tenant in tail, before the happening of the event on which the limitation is to arise, will destroy such limitation.

Tit. 16. c. 5.

I Inst. 327 *a.* *n.* 1.

30. Thus although a shifting clause, annexed to the limitation of a use in fee, must take effect within the period above mentioned; yet where an estate is limited to a person for life, with remainder to his first and other sons in tail; with a proviso, that if a certain estate shall devolve on the tenant for life, or any of his sons, the estate limited to him, and also those limited to his sons, shall cease, as if he and they were dead without issue, and the estate shall go over to another person; this clause is good: because when the first or other son attains 21 years and comes into possession, he may bar his estate tail, and also the effect of this clause, by a common recovery; so that there is no danger of a perpetuity.

Doe v. Heneage, Tit. 16. c. 5. § 35.

An unborn Person may be made Tenant for Life

1 East R. 452.

ante, § 27.

31. It was formerly much doubted whether a limitation for life to an unborn person was good. But it is now fully settled that such a limitation is valid.

In a modern case Lord Kenyon said—"I remember hearing Lord Mansfield say; that when the case of Spencer v. D. of Marlborough was to be argued in the House of Lords, there was found to be a mistake

in the printed reasons, on the part of those who opposed the execution of the power in the manner intended. For it had been stated that there could not be a limitation to an unborn child for life; but that was found to be wrong*; for certainly there may be such a limitation: they therefore cancelled that reason, and framed another, stating the proposition to be, that there could not be a limitation to an unborn child for life, with limitations to the issue of such unborn child, in succession And that doctrine was distinctly laid down by the learned Judge who delivered the opinion of the judges in the House of Lords."

Hay v. Coventry, 3 Term R. 83. S.P.

32. An estate may also be limited by an appointment to a person for life, who is not born at the time when the deed by which the power was created was executed.

Brudenell v. Elwes, ante, c. 16. § 47.

33. It is now also settled, that a vested remainder may be limited upon an estate for life given to an unborn person: and Lord Alvanley has said—"A question might arise how far an unborn child is to be made tenant for life: but it is established on good principles, in precedent, certainly that this may be. The doubt was, whether this was not tying up the estate beyond lives in being, and 21 years afterwards: but that is not so, where the absolute interest is disposed of and vested, though part is given for life; for that person, with the person having the absolute interest, may dispose of it: it is not unalienable."

And a vested Remainder limited on that Estate. Rutledge v. Dorrell, 2 Ves. Jun. 357.

34. But it is equally clear, from what has been stated in the preceding sections, that an estate limited to the issue of an unborn person, as purchasers,

But no Estate can be limited to the Issue of an unborn Person.

* Mr. Booth was the person who pointed out that circumstance to Mr. Filmer. Cases and Opin. vol. 2. 434.

Fearne, Ex. Dev. 502. 6th edit.

would be void; being a possibility upon a possibility, which the law will in no case admit: and would also render an estate so limited unalienable for a longer period than is allowed. But a limitation of this kind would not render the limitation to the unborn person for life, void.

Perpetuities created by Act of Parliament.

35. Estates may be rendered unalienable by act of parliament, as in the case of estates tail granted by the Crown to individuals, as a reward for services where the remainder or reversion is vested in the Crown; which cannot be barred by fine or recovery.

Vide Tit. 36. c. 10.

36. There are also several instances of particular estates, which are rendered unalienable by act of parliament. Thus, by a special act of parliament made in 27 Hen. VIII. the manor of Hemston Arundel was entailed to Anne wife of Charles Lord Mountjoy, and John Pawlet and Elizabeth his wife, and to the heirs of their bodies begotten; with a proviso, that they should not bar the entail; which was held good by the Court of King's Bench.

Mountjoy's Case, 5 Rep. 3.

37. By a private act, 3 Cha. I. the castle, honour, manor, and lordship of Arundel, together with other estates, were limited to Thomas Earl of Arundel and Surrey, and the heirs male of his body, remainder to the heirs of the body of the said Earl, remainder to Lord William Howard and the heirs male of his body, remainder to the heirs of the body of the said Lord William Howard, remainder to the said Earl of Arundel and his heirs. And it was enacted, that neither the said Thomas Earl of Arundel, nor any of the heirs male or other heirs of his body, nor any other person or persons, his or their heirs male of his or their bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, should thereafter come, descend, or accrue, by force or means of

the said act, should thereafter alien, give, grant, bargain and sell, or otherwise convey away the same, or any part thereof, or any other thing do, which should or might be to the disherison of the heirs inheritable by force of the said act, or whereby any of them should be barred, or put from entry into the premises.

38. By the stat. 5 Ann. c. 3. it is enacted, that the Duke of Marlborough shall stand and be seised of the honour, manor, and park of Woodstock, for and during the term of his natural life, remainder to the heirs male of his body, remainder to all his daughters, and the heirs male of their respective bodies, severally and successively, according to the priority of their birth; with a proviso, that neither the duke or the heirs male of his body, nor any of his daughters or the heirs male of their bodies, shall have any power, by fine or recovery, or any other act, to hinder, bar, or disinherit any the person or persons to or upon whom the said manors, &c. were thereby limited, from holding or enjoying the same, according to the limitations in the act mentioned.

TITLE XXXII.

DEED.

CHAP. XXIV.

Construction.—Of the Reddendum, Condition, and Warranty.

1. *Of the Reddendum.*
2. *Condition. By what Words created.*
12. *Warranty.*
13. *Express Warranty.*
17. *Implied Warranty.*
25. *Lineal Warranty.*
28. *Only binds the Heir where he has Assets.*
30. *Collateral Warranty.*
35. *Statute of Gloucester.*
36. *Statute De Donis.*
37. *Does not extend to Collateral Warranty.*
39. *Which bars all Remainders.*
42. *But not the Reversion.*
44. *Stat. 11 Hen. VII. c. 20.*
46. *Stat. 4 Ann. c. 16.*
47. *How Warranties may be destroyed.*

SECTION 1.

Of the Reddendum.

1 Inst. 47 *a*. Touch. 80.

WITH respect to the *reddendum*, or reservation in a deed, the following circumstances are necessary to make it good: 1°. It must be by apt words. 2°. It must be of some other thing, issuing or coming out of the thing granted; and not a part of the thing itself, nor of something issuing out of another thing. 3°. It must be of such thing whereunto the grantor may resort, to distrain. 4°. It must be made to one of the grantors, and not to a stranger to the deed.

Tit. 28. c. 1.

Condition. By what Words created.

§ 328.

2. The nature of conditions having been explained in Title XIII., it will here only be necessary to inquire by what words a condition in deed may be created.

3. Littleton says—"Divers words there be, which by virtue of themselves make estates upon condition.

One is the word, *sub conditione*. As if A. enfeoff B. of certain lands, to have and to hold to the said B. and his heirs, upon condition that the said B. and his heirs do pay, or cause to be paid, to the aforesaid A. and his heirs yearly such a rent, &c. : in this case, without any more saying, the feoffee hath an estate upon condition. Also if the words were such; provided § 329.
always, that the aforesaid B. do pay, or cause to be paid, to the aforesaid A. such a rent, &c.; or these so that the said B. do pay, or cause to be paid to the said A. such a rent, &c.; in these cases, without more saying, the feoffee hath but an estate on condition. Also there be other words in a deed, which cause § 330.
the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c., and afterwards this word is put into the deed; that if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter, &c. : this is a deed upon condition."

4. There are other words that make a condition in a deed, provided a power of entry is added to them. Thus Littleton says, the words *si contingat* § 331.
will create a condition, if a power of entry is added; and therefore, if A. grants lands to B., to have and Touch. 122.
to hold to him and his heirs; and if, or, but if it happen, that the said B. do not pay to A. 10*l.* at Easter, without more words, this is not a good condition. But if these words be added, that then it shall be lawful for A. to re-enter, it will be a good condition.

5. It is said in the Touchstone, that although the words proviso, *ita quod*, and *sub conditione*, are the most proper words to make a condition, yet they had not always that effect, but frequently served for

other purposes: for sometimes they operated as a qualification or limitation, and sometimes as a covenant. And when inserted among the covenants in a deed, they operated as a condition only when attended with the following circumstances: 1°. Where the clause wherein they were, had no dependance upon any other sentence in the deed, but stood by itself. 2°. Where it was compulsory to the feoffee, donee, &c. 3°. Where it came on the part, and by the words of the feoffor, donor, or lessor, &c. 4°. Where it was applied to the estate, and to some other matter.

Idem. 6. Thus, if a person grants a manor, with an advowson appendant, and after the *habendum* and reservation of the rent, amongst the covenants, there is this clause inserted: provided that the grantee shall regrant the advowson for the life of the grantor: this is a good condition.

Idem. 1 Inst. 203 *b.* 7. The word provided may operate as a condition and a covenant; as if the words are, provided always, and the feoffee doth covenant, that neither he nor his heirs shall do such an act: this is both a condition and a covenant. But if the clause have dependance on another clause of the deed; or be the words of the feoffee to compel the feoffor to do something; then it is not a condition, but a covenant only: as if there be in a deed a covenant that the lessee shall scower the ditches, and then these words follow, provided that the lessor shall carry away the earth: or if there is a covenant that the lessee shall repair the houses, and then these words follow; provided that the lessor do provide timber: there it is only a covenant.

Idem. 8. So if this clause be applied to some other thing, and not to the thing granted, then it is no condition. As if a lease of land be made, rendering rent

at B.; provided that if such a thing happen, it shall be paid at C.: this does not make the estate conditional. Or a lease is made for years, without impeachment of waste; provided that the lessee shall not pull down the houses: this does not make the estate conditional. Or a lease is made for years, rendering rent; provided that the lessor shall not distrain for the rent: this is a good condition, but not annexed to the estate.

9. Lord Coke says, the word *si*, if, frequently creates a condition, but not always; for sometimes it makes a limitation; as where a lease is made for years, if J. S. shall so long live. 1 Inst. 204 *a.* 214 *b.* Touch. 123.

10. Conditions may be annexed to demises for years, without any of these formal words, where the apparent intent of the lessor is to make the estate conditional; although the words be not used as the words of the lessor, but as those of the lessee, or indefinitely of neither. Thus if a lessee for years covenants in his lease, that if he his, executors or assigns, shall alien, it shall be lawful for the lessor to re-enter; it seems this is a good condition, and not a covenant only: and the lessor may take it as a covenant or condition; but not as both. Id. 1 Inst. 204 *a.* Whichcot v. Fox, Tit. 13. c. 1. § 39.

11. It was laid down in a modern case, by the Court of King's Bench, that no precise technical words are required in a deed, to make a stipulation a condition precedent or subsequent: neither did it depend on the circumstance, whether the clause was placed prior or posterior in the deed, so that it operated as a proviso or a covenant; for the same words had been construed to operate as either the one or the other, according to the nature of the transaction. 1 Term R. 645. Willes Rep. 156.

Warranty. ante, c. 2. § 69.

12. Lord Coke's description of a warranty having been already stated, I shall proceed to inquire into the different kinds of warranties, and their effects.

Express Warranty.

13. A warranty may either be expressed, or implied; either in deed, or in law. An express warranty, or a warranty in deed, is where the grantor of an estates enters into an express agreement, to warrant it to the grantee: and in this the word *warrantizo*, or warrant, is the only apt and effectual one, and cannot be supplied by any other.

1 Inst. 384 *a.*

14. The usual form of a warranty was thus—*Et ego prædictus Willielmus et hæredes mei et mei assignati totam prædictam acram terræ, cum omnibus suis pertinentiis prædicto Johanni et hæredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum.*

15. The word heirs is absolutely necessary in an express warranty; for otherwise the heirs of the warrantor will not be bound. It is the same with respect to the person to whom the warranty is made; for if it be not to the warrantee and his heirs, or in words which imply his heirs, it will cease upon the death of the warrantee.

1 Inst. 383 *b.*
Id. 47 *a.* 385 *b.*

1 Inst. 367 *b.* Touch. 186.

16. To make a good express warranty, the following circumstances are necessary:—1°. That the person who makes the warranty be capable of so doing: for if an infant makes a feoffment in fee of land, and binds himself and his heirs to warrant it, the warranty is void, though the feoffment is only voidable.

1 Inst. 386 *a.*

2°. A warranty must be made by deed in writing; for a warranty inserted in a will would be void. 3°. There must be some estate to which the warranty is annexed, that is capable of supporting it: for if a person covenants to warrant land to another, and

makes him no estate, or makes him an estate that is not good, and covenants to warrant the thing; in these cases the warranty is void. 4°. The estate to which the warranty is annexed must be capable of supporting it, that is, it must be an estate of freehold: for if a person makes a lease for years, and binds himself and his heirs to warrant the land to the lessee, this is no warranty; though it may amount to a covenant. 5°. The warranty must descend upon the person who is heir of the whole blood, by the common law, to him who made the warranty. 6°. The heir must continue heir; and neither the descent of the title, nor of the warranty, must be interrupted: for if a person binds himself and his heirs to warranty, and afterwards is attainted of treason or felony, and dies, this warranty will not bind his heirs. So if a tenant in tail be disseised, and after release to the disseisor, with warranty, and the tenant in tail is attainted of felony, and hath issue and dies, this warranty will not bind the issue. 7°. The estate that is to be barred by a warranty, must be divested and turned to a right, before or at the time when the warranty is made; and the person on whom the warranty descends, must then have but a right to the land. 8°. The warranty must take effect in the lifetime of the ancestor, who must be bound by it; for the heir shall never be bound by an express warranty, unless the ancestor was bound by it. 9°. The heir must claim in the same right that the ancestor did. So the heir must be of full age, when the warranty falls upon him; otherwise he will not be barred by it.

1 Inst. 378 *a.*

1 Inst. 386 *a.*

10 Rep. 96. Vide Tit. 35. c. 13.

1 Inst. 386 *a.*

1 Inst. 370 *a.* 380 *a.* 1 Ld. Raym. 35.

17. Implied warranties arise from some other word than the word warranty; or from the nature of the deed.

Implied Warranty.

Diss. c. 1. § 64.

18. It has been already stated, that by the feudal law, in case the vassal was evicted out of his feud, the lord was obliged to give him another of equal extent. In conformity to this principle, it appears to have been the established law, when Glanville wrote, that every feoffment implied a warranty—

Glanv. lib. 7. c. 2. *Tenentur autem hæredes donatorum, donationis et res donatas sicut rationabiliter factæ sunt, illis quibus factæ sunt, et hæredibus suis warrantizare.* The same law

Bract. 338 b. prevailed in Bracton's time—*Et sciendum est quod ad omnes chartas de simplici donatione, competit tenenti warrantizatio, et tenentur donatores, et eorum hæredes, ad warrantiam, &c. nisi forte in charta de feoffamento contrarium exprimitur.*

19. This doctrine was confirmed by the statute

2 Inst. 274. *De Bigamis*, 4 Edw. I., which declares, that "in deeds where is contained *dedi et concessi tale tenementum*, without homage, or without a clause that containeth warranty, and to be holden of the givers and their heirs, by a certain service; it is agreed, that the givers and their heirs shall be bounden to warranty. And where is contained *dedi et concessi*, &c., to be holden of the chief lords of the fee, or of others, and not of the feoffors, or of their heirs, reserving no service, without homage, or without the foresaid clause, their heirs shall not be bounded to warranty; notwithstanding the feoffor, during his own life, by force of his own gift, shall be bound to warrant."

20. In this case it is evident, that the warranty was a consequence of tenure; for where there was no tenure between the feoffor and feoffee, the warranty was confined to the donor, who was considered as bound by his own act, but did not extend to his

heirs. When it was enacted by the statute *Quia emptores*, that in all future feoffments in fee simple, the feoffee should hold of the chief lord, and not of the feoffor, the implied warranty arising from the word *dedi*, was held only to bind the feoffor during his life, and not his heirs. But where a person granted lands to another in tail, or for life, reserving the reversion to himself, as the grantee held of the grantor, there being a tenure subsisting between them, the old law still continued; and therefore, where these estates were created by the word *dedi*, the donor and his heirs were bound to warranty. But where a person granted an estate tail, or for life, by the word *dedi*, with a remainder over in fee simple, as no tenure continued between the donor and donee, the warranty only continued during the life of the donor.

ante, c. 1. § 11.

1 Inst. 384 *a*. 2 — 275.

21. Lord Coke says, if a man makes a lease for life by the word *dedi*, reserving rent, and adds an express warranty, it will not take away the warranty in law; for the lessee will have his election to vouch by force of either of them.

1 Inst. 384 *a*. *n*. 1.

22. The doctrine of implied warranties still exists where estates tail or for life are created by the word *dedi* or give; and the donor does not part with the reversion. But Lord Coke says, *dedi* is the only word that implies a warranty, and not the word *concessi*. It has however been generally supposed, that the word grant in any conveyance will create a warranty, and therefore trustees are frequently advised not to convey by the word grant. But it is now agreed, that the word grant, when used in the conveyance of a freehold estate, does not imply a warranty; and that if it did, the insertion of any express covenant on the part of the grantor, would qualify and restrain its force and operation within the import

Idem.

real effect of that covenant; for when it appears, by express words, how far the parties designed the warranty should extend, the law will not carry it farther by construction.

23. It was resolved in 1 James,—1°. That in every exchange the word *excambium* implies in itself *tacitè* a condition, and also a warranty; the one to give a re-entry, and the other, a voucher and recompense: and all in respect of the reciprocal consideration, the one land being given in exchange for the other. But it is a special warranty; for upon the warranty by force of it, he shall not recover other land in value, but that only which was by him given in exchange. For inasmuch as the mutual consideration is the cause of the warranty, it shall therefore extend only to lands reciprocally given, and not to other lands. And this warranty runs only in privity, it does not touch by force of it, but the parties to the exchange or their heirs, and no assignee. 2°. That if A. gives in exchange three acres to B. for other three acres, and afterwards one acre is evicted from B., in that case the whole exchange is defeated, and B. may enter into all his land; for although the exchange had been good, if A. had given but two acres, or but one acre or less, yet forasmuch as all the three acres were given in exchange for the others; and the condition which was implied in the exchange was entire: upon the eviction of one acre, the condition as to all was broken, and therefore an entry was given as to the whole. 3°. That as, when the whole estate in part was evicted, the exchange was defeated; so when an estate of freehold for life, which was but parcel of the estate, was evicted, the exchange was defeated.

24. In all deeds of partition between coparceners, there is a warranty annexed to each part; so that if

either be impleaded, she may vouch her sister; and if she loses, she may recover one moiety of her loss in value against the other sister. For there is a condition annexed to every partition, similar to that annexed to every exchange; that if either the whole of any one share, or an estate for life, or in tail, be thereout evicted, the party so evicted may enter on her sister's moiety, and avoid the partition of an undivided moiety of what is left. Vide Tit. 19. § 29.

25. Warranty is again divided into lineal and collateral. Lineal warranty is where the heir derives, or might possibly derive, his title to the land warranted, either from or through the ancestor who made the warranty. Thus, where a man seised in fee made a feoffment, and bound himself and his heirs to warranty; and died, leaving a son, upon whom the warranty descended; it was a lineal warranty. So where a father, or an eldest son in the lifetime of his father, released to a disseisor, with warranty, this was lineal to the younger son. Lineal Warranty. Lit. § 707.

26. The effects of a lineal warranty are, 1. To bar the warrantor and his heirs from ever claiming the lands warranted; so that if a purchaser with warranty is impleaded by the warrantor or his heirs, he may show his warranty, which in pleading is called a rebutter, and is an effectual bar to the claim. 2. To compel the warrantor and his heirs to give the warrantee, in case of eviction, lands of equal value to those he has lost; and therefore if a purchaser with warranty is impleaded or sued by a stranger for the land, he may vouch, that is, call in the warrantor or his heirs, to defend the land; and if the vouchee cannot defend them, he must then give the warrantee lands of equal value to those he has lost.

Fitz. N. B. 134. 1 Rep. 1.

27. A purchaser with warranty may also at any time bring a writ of *warrantia chartæ* upon the warranty, either against the warrantor or his heirs; and by that means all the lands whereof the warrantor or his heirs was seised at the time of suing out the writ, will be bound and charged with the warranty.

Only binds the Heir where he has Assets.

28. The obligation which the heir of the warrantor is under, in the case of a lineal warranty, of giving the warrantee, upon eviction, lands of equal value to those he has lost, is however only on condition that he has other lands of equal value by descent from the warranting ancestor; which are called assets.

1 Inst. 374 *b.*

29. Lands in possession of an heir must have the following qualities: 1. They must be assets, that is of equal value or more at the time of the descent. 2. They must be by descent, and not by purchase or gift. 3. They must be estates in fee simple, and not in tail, or for another man's life. 4. They must descend to him as heir to the same ancestor that made the warranty. 5. Nothing but lands or tenements, or rents or services valuable, or other profits issuing out of lands or tenements, are assets; and not personal inheritances, as annuities and the like. 6. The lands must be in estate or interest, and not in use, or right of action, or right of entry; for they are not assets till they are reduced into possession.

Collateral Warranty.

30. A collateral warranty is, where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor: and yet it barred the heir from ever claiming the land; and also imposed on him the same obligation of giving the warrantee other lands, in case of eviction, as if the warranty were lineal, provided the heir had assets.

§ 704, 5.

31. Thus Littleton says, if there was father and son, and the son purchased lands in fee, and the

father disseised the son, and aliened in fee by deed; and bound himself and his heirs to warranty, and died; the son was barred by this warranty, which was collateral, though it descended lineally from the father to the son; because the son did not derive his title to this estate from his father; for the father had no estate in right in the land.

32. The effect of a collateral warranty is so singular, and so apparently unjust, that many inquiries have been made respecting its origin.

Sir Martin Wright endeavours to account for it in the following manner. It was a maxim of our ancient law, that no person could alien his feud without the consent of his next collateral heir; *qui proximus erat in successione collaterali*: for although the law trusted the ancestor with the interest of his own immediate descendants, yet he could not disinherit the next collateral heir, who having a distinct, though remote interest, in the feudal donation, could not be deprived of it, but by an act of his own. This manifestly pointed out the foundation, and partly suggested the reason, of collateral warranty. Though it was not easy to conceive how it came to pass, that the concurrence or simple consent of the next collateral, which by the old law was required to defeat his own hopes of the succession, should swell up to our notions of collateral warranty, and be advanced into a means to defeat even estates to which such collaterals could have no possible hopes of succeeding. Tenures, 168.

33. Lord Chief Baron Gilbert, whose authority is of the greatest weight, has endeavoured to account for collateral warranty in another manner. He thought it was introduced for the quieting disseisins, that were usually very frequent in those unsettled times, between neighbouring feudaries, (and from thence called Ten. 143.

deadly feuds), for which purpose it was usual for such disseisors to purchase warranties from some ancestor of the family. And this gave a right to such disseisor; for it might be easier to compound with the ancestor, than with the party to whom the wrong was actually done, and then to quiet men's possessions, such warranty bound; if the owner acquiesced under his expectations from such relations.

Vaugh. Rep. 366. 375.

34. Lord Chief Justice Vaughan says, at common law, the distinction of a lineal and collateral warranty was useless and unknown; for though what we now call a collateral and a lineal warranty might be in speculation, yet as to any effect in law there was no difference: but the warranty of the ancestor descending on the heir, whether the one or the other, equally bound; and this appeared from Littleton, whose words were, § 697,—"Before the statute of Gloucester, all warranties which descended to them which are heirs to those who made the warranties, were bars to the same heirs to demand any lands or tenements against the warranties, except the warranties which commence by disseisin."

Vide 12 Mod. 512.

Statute of Gloucester.

35. There have been several statutes made to restrain the operation of warranties. The first of these is the statute of Gloucester, 6 Edw. I. c. 1., by which it was enacted, 1. That if a tenant by the curtesy aliened with warranty and died, this should be no bar to the heir, in a writ of *mort d'ancestor*, without assets in fee simple. And if lands and tenements descended to the heir from the father, he should be barred, having regard to the value thereof. 2. That if the heir, for want of assets at that time descended, recovered the lands of his mother before this act, and afterwards assets descended to the heir from the father; then the tenant should recover

1 Inst. 365 a. 2—291.

against the heir the inheritance of the mother, by a writ of false judgement.

36. The next statute by which the operation of warranties was abridged, was the statute *De donis conditionalibus*, the object of which was to secure the continuance of the estate tail to the issue of the donee, and the reversion to the donor. In consequence of which, the Judges held, that a tenant in tail could not bar his issue, by a lineal warranty, without assets; for otherwise every tenant in tail might have evaded the statute. But by a kind of analogy to what the Legislature had done by the statute of Gloucester, they held that such a warranty would bar the issue, if he had assets.

Statute De Donis, Tit. 2. c. 1.

Lit. § 712. Gilb Ten. 142.

1 Inst. 374 *b*. 393 *b*.

37. It was however held, that a collateral warranty was not prohibited by that statute; for as it only declared, that the will of the donor should be observed, the Judges would not extend it to collaterals; who did not take by the gift, and therefore could not be forbidden from barring by their warranty.

Does not extend to collateral Warranty. Gilb. Ten. 142. 145.

38. Thus Littleton says, if a tenant in tail hath issue three sons, and discontinues the estate tail in fee, and the second son releases by deed to the discontinuee with warranty, and dies without issue; this warranty will rebut the eldest son, and prevent him from recovering the estate tail; because it is a collateral warranty; for the eldest son cannot make a title to the second son under the entail. And Lord Coke, in his comment on this passage, says,—"A collateral warranty, made by a collateral ancestor of the donee, doth bind the right of an estate tail, albeit there be no assets. And the reason thereof is upon the statute of *Donis conditionalibus*, for that it is not made by the tenant in tail, &c. as the lineal warranty is.

§ 708, &c.

1 Inst. 374 *b*.

Which bars all Remainders.

39. With respect to remainders expectant on estates tail, there is nothing in the statute *De Donis* which either directly or indirectly restrains the tenant in tail from barring them by his warranty; and therefore, the operation of a warranty in rebutting remainder-men expectant upon estates tail, remains as it was before the statute; so that such warranty is a bar without assets.

§ 716.

40. Thus Littleton says, if a man has issue three sons, and give, land to the eldest son, and the heirs of his body, remainder to his second son and the heirs of his body, remainder to the third son in the same manner; in this case, if the eldest son discontinues the estate tail in fee, and binds himself and his heirs to warranty, and dies without issue; this is a collateral warranty to the second son, and will bar him from demanding the land by force of the remainder: for that the remainder was his title, and his elder brother was callateral to this title, which commenced by force of the remainder.

Sym's Case, 8 Rep. 51. Cro. Ja. 217.

Vaugh. 367.

41. In the case of Bole v. Horton, which will be stated hereafter, Lord Ch. Just. Vaughan lays it down as clear law, that the statute *De Donis* does not restrain the warranty of tenant in tail from barring remainder-men by the descent of the warranty on them—1°. Because the mischief complained of in the statute was, that the issue in tail was disinherited; but the warranty of the donee in tail, descending upon the remainder-man, who claims by purchase from the donor, and not by descent from the donee in tail, could be no disinheriting of the issue of the donee. 2°. The statute did not provide against inconveniences or mischiefs which did not exist at the time of making the statute. Now, when the statute was made, there could be no remainder in tail, because all estates which are estates tail since the statute,

were fee simple conditional before the statute, upon which a remainder could not be limited. Vide Tit. 35. c. 9.

42. With respect to a reversion expectant on an estate tail, it has never been determined that it may be barred by the warranty of the tenant in tail; and the better opinion appears to be that it would not be barred by it. But not the Reversion.

43. W. Vesey devised certain lands to J. Vesey his eldest son for life, remainder to the heirs male of his body, remainder to Robert Vesey and the heirs male of his body, remainder to William Vesey and the heirs male of his body, remainder to Mathew Vesey and the heirs male of his body, and died, John entered and died without male issue, leaving two daughters, Elizabeth and Sarah. Robert entered, and died seised without male issue; upon which William entered: and Mathew died without male issue in the lifetime of William. William made a feoffment in fee of the lands with warranty, to the use of himself for life, remainder to the use of Ann his wife for life, remainder over. William died without issue male, and Ann his wife entered. Elizabeth and Sarah, the daughters and coheirs of John and William, brought a *formedon* in the reverter against Ann the widow of William; and the question was, whether Ann could rebut them by the warranty. Bole v. Horton, Vaugh. 360.

Lord Ch. Just. Vaughan argued that the statute *De Donis* restrained the warranty of tenant in tail from barring the donor's reversion, by expressly providing that the donee in tail should not have it in his power to bar the donor of his reversion. *Ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum quibus tenementum sic fuerit datum remaneat post eorum obitum; vel ad dona-*

torem, vel ad ejus hæredem, si exitus deficiat, revertatur. By these words the donee or tenant in tail was restrained from all power of alienation, whereby the lands entailed might not descend to the heir in tail, after his death. Therefore by these words he was restrained from alienation with warranty, which doubtless would hinder the lands so to descend, if it were not restrained by the words of the statute. By the same words the donee in tail was restrained from the power of alienation, whereby the land entailed might not revert to the donor, for want of issue in tail. Therefore by those words he was restrained from such alienation with warranty, whereby the lands entailed might not revert to the donor or his heirs, for want of issue in tail; for the same words of the statute must be of equal power and extent to restrain the donee's alienation from damaging the donor, as from damaging the issue in tail. Admit the words of restraint in the statute had been *rex statuit &c. ita quod non habeant illi quibus tenementum sic fuit datum sub conditione potestatem alienandi tenementum sic datum per warrantiam, vel aliter, quo minus ad exitum eorum remaneat, vel ad donatorem revertatur:* it had then been clear to every understanding, that the warranty of the donee, or tenant in tail, by the express words of the statute, did neither bar the donor, nor the issue in tail; and then observe what consequences had been rightly deduced from such restraint, made by the statute. The statute expressly restrains the warranty of tenant in tail from barring his issue; whence it follows that by, the statute, the issue in tail is not barred by the lineal warranty of the tenant in tail, because his warranty upon the issue in tail cannot possibly be any other than a lineal warranty. It may be said in like manner

that the statute *De Donis* restrains the warranty of tenant in tail from barring the donor, or his heirs of the reversion: the consequence thence deducible was, that the statute restrained the collateral warranty of tenant in tail from barring the donor or his heirs; because his warranty falling upon the donor or his heir, could be no other than a collateral warranty. Now it was true, the word warranty was not, in syllables, within the restraint of the statute; but it was necessarily implied in it, else the issue in tail would be barred by the warranty of tenant in tail, without assets; contrary to all the books since the making of the statute. But those general words of the statute, restraining the donee's power of alienation in express terms, equally and *pari passu* for the benefit of the donor, as for the benefit of the issue in tail, could never be understood to restrain the warranty of tenant in tail only, for the benefit of the issue in tail, but not for the benefit of the donor. But the statute must necessarily restrain the warranty, indefinitely from hurting either; and by consequence his lineal warranty was restrained from hurting his issue, and his collateral warranty from hurting the donor; to whom his warranty could never be but collateral; as it could never be but lineal to the issue in tail. And if the warranty were necessarily understood and implied in the statute, its operation must be the same, as if it had been expressly inserted in the statute. Then to say that, by the restraint of the statute, the donees have *not* power to alien the land entailed, *quo minus ad exitum illorum remaneat post illorum mortem*; but they *have* power to alien *quo minus ad donatorem revertatur, deficienti exitu*; would be to make the statute contradictory to itself.

No judgment was given in this case, the Court being divided. Vaughan and Archer for the demandant, and Wylde and Atkins for the tenant. But Vaughan's opinion is generally held to be law.

St. 11 Hen. 7. c. 20.

44. By the statute 11 Hen. VII. c. 20. it is enacted, that in case a wife, after the death of her husband, shall alone, or with any after-taken husband, alien with warranty any lands which she holds in dower, or of which she is seised in tail, of the gift of her former husband, or of any of his ancestors, such warranty shall be void.

Stat. 4 Ann. c. 16.

45. By the statute 4 Ann. c. 16. § 21. it is enacted, that all warranties made after the first day of Trinity term 1706, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect. And likewise all collateral warranties which shall be made after the same day, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir.

Vide Tit. 35. c. 9.

46. It is observable that this act does not extend to alienations by tenants in tail in possession; and therefore their warranties are not restrained by this act, but have the same effect as they had before.

How Warranties may be destroyed.

47. A warranty, whether lineal or collateral, may be defeated, determined, or avoided, in all or in part. And this is sometimes by matter in law, and sometimes by matter in deed.

Touch. 201.

48. Thus if the estate to which the warranty is annexed be gone, the warranty is gone also; and therefore if an estate tail, to which a warranty is annexed, be spent, the warranty is determined.

Lit. § 745. 747. 1 Inst. 391 *b*.

49. So a warranty may be destroyed by the attainder of the warrantor. Thus if tenant in tail is disseised,

and releases to the disseisor, with warranty, and afterwards is attainted, and dies leaving issue; in this case the issue may enter on the disseisor: for the warranty did not descend to the issue in tail; because his father, by the attainder, became incapable of transmitting any thing by descent.

50. Warranties may also be defeated by matter in deed: as if the person to whom a warranty is made, or who has the estate to which the warranty is annexed, releases to the person who is bound to warrant, all warranties, or all manner of covenants real, or all manner of demands, the warranty is extinct. Lit. § 748.

TITLE XXXII.

DEED.

CHAP. XXV.

Construction.—Of Covenants.

1. *Nature of.*
5. *No technical Words necessary.*
13. *Implied Covenants.*
16. *Qualified by express ones.*
18. *Joint and several Covenants.*
22. *Of Covenants Real.*
26. *Extend to all claiming under the Grantee.*
34. *Exception. Under-tenants.*
38. *The Assignor is still liable.*
40. *Descend to the Heirs of the Grantors.*
41. *And go to the Grantees of the Reversion.*
44. *General and Specific Covenants.*
46. *Usual Covenants for the Title.*
47. *That the Grantor is seised in Fee, &c.*
51. *For quiet Enjoyment.*
60. *Free from Incumbrances.*
62. *For further Assurance.*
67. *Run with the Land.*
71. *Are now usually restrained.*
75. *According to the Title of the Vendor.*
79. *Who are held to claim under the Vendor.*
85. *Who are bound to covenant for the Title.*
89. *Remedies under these Covenants.*
98. *Covenants in Assignments of Leaseholds.*
100. *Covenants for Production of Title Deeds.*
101. *Covenants for Renewal of Leases.*

Section 1.

Nature of.

A COVENANT is an agreement in a deed, by which one person obliges himself to do something beneficial to, or abstain from something which, if done, might be prejudicial to another; and a great variety of agreements of this kind have been introduced into modern deeds.

2. A covenant is generally an agreement to do something *in futuro*; and differs from the case where an agreement refers to a thing which is not to be done by the person of any, but to a thing to be executed in itself: and where an agreement terminates in itself, it is not properly a covenant, but a defeazance. A covenant may, however, be executed, namely, that a thing is already done. Plow. 138. 1 Vent. 26. Touch. 162.

3. A covenant can only be created by deed; but it may be as well by deed-poll, as by indenture; for the covenantee's acceptance of the deed is such an assent to the agreement, as will render it binding on him. But the party must be named in the deed-poll. 1 Roll. Ab. 517. Lit. § 375. Green v. Horne, 1 Salk. 197.

4. Where lands are conveyed by indenture by two persons, and one of them does not seal the deed, yet if he enters upon the land, and accepts of the deed, in other matters, he will be bound by the covenants contained in it. And where an estate is limited to a person for life, with a remainder to another, who is not a party to the deed, if the remainder-man enters, he will be bound by the covenants contained in the deed. 1 Inst. 231 *a.* ante, c. 2. § 3.

5. The law has not appropriated any particular form of words to the creation of a covenant; therefore any words will be sufficient which show the intention of the parties. No Technical Words necessary.

6. Thus, where A. leased to B. for years, upon condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses, at the end of the term, in as good plight as he found them; it was held, that these words created a covenant. Bro. Ab. Cov. pl. 4.

7. Queen Elizabeth, by letters patent, let a house to W. Cumberland, wherein were these words: "and Bret v. Cumberland, Cro. Jac. 399.

the said lessee, his executors and assigns, *reparabunt domum prædictam*, and shall leave the said house so repaired, &c." The Court held, that these words in the Queen's patent amounted to a covenant on the part of the lessee; and he accepting the lease, was bound by it.

Holder v. Taylor, 1 Roll. Ab. 518.

8. If a lessee for years covenants to repair, &c. provided always, and it is agreed, that the lessor shall find great timber, &c.: this makes a covenant on the part of the lessor to find great timber, by the word agreed; and it shall not be a qualification of the covenant of the lessee. But if the lessee covenanted to repair, provided always, that the lessor shall find great timber; without the word *agreed*, this proviso would not create any covenant on the part of the lessor, but would only be a qualification of the covenant of the lessee.

Hollis v. Carr, 2 Mod. 86. Id. 268.

9. In articles of agreement, reciting an intended marriage, it was covenanted, that in consideration of the lady's portion, a jointure should be settled on her; and the conclusion was in these words: "And it is hereby agreed, that a fine shall be levied to secure the payment of the said portion."—It was resolved, that these words created a covenant to levy a fine. For wherever there is an agreement under hand and seal, covenant lies.

Appleton v. Binks, 5 East, 148.

10. It was held in a modern case, that where a person, for himself, his heirs, executors, &c., on the part and behalf of A. B., covenanted that the said A. B., his heirs, &c., should pay a sum of money, and sealed the deed; he was personally bound by the covenant.

Rudge v. Pincombe, 1 Roll. Ab. 519. Hob. 3. 1 Ves. Rep. 516.

11. If a man conveys land to another in fee, with warranty, and after the land is evicted by elder title for certain years, the grantee of the land may have

an action of covenant upon the said words, against the grantor, upon the eviction, though the warranty be annexed to the freehold; for the said words make a covenant if a chattel be evicted; and a warranty, if a freehold be demanded.

12. A covenant being part of a deed, is subject to the general rules of exposition of deeds. As, 1°. To be always taken most strongly against the covenantor, and most in advantage of the covenantee. 2°. To be taken according to the intent of the parties. 3°. To be construed *ut res magis valeat quam pereat.* 4°. When no time is limited for its performance, it must be done within a reasonable time. Touch. 166. T. Raym. 164.

13. There are some words which, when used in particular contracts, will create a covenant. Thus the words grant or demise, in a lease for years, create a covenant in law for quiet enjoyment of the lands demised, during the term. And if the lessee be evicted by the lessor, or by any other person claiming a lawful title to the land, he may bring an action thereupon. Implied Covenants. 4 Rep. 80 *b.* 5 — 17 *a.*

14. So if a lease for years be made, reserving or yielding and paying a certain rent; these words will create a covenant for payment of the rent. Giles v. Hooper, Carth. 135.

15. Lord Mansfield has observed, that the distinction between implied covenants, by operation of law, and express covenants, is, that express covenants are taken more strictly; for a man may, without consideration, enter into an express covenant, under hand and seal. 3 Burr. R. 1639.

16. An express covenant will qualify the generality of an implied covenant, and restrain it, so that it shall not extend farther than the express covenant. Qualified by express ones.

17. A person made a lease of a house by the words demise, grant, &c., and the lessor covenanted that Noke's Case, 4 Rep. 80 *b.* 1 Mod. 113. 1 Vesey, 101.

the lessee should enjoy the house during the term, without eviction by the lessor, or any claiming under him. The lessee was evicted by a person who did not claim under the lessor. It was held by Popham, Ch. Just., and all the other Judges, that the express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, that it should not extend further than the express covenant.

Joint and several Covenants.

18. Where several persons enter into a covenant, they may either bind themselves altogether, or else they may only bind each of themselves severally: from which arises a distinction between joint and several covenants. A covenant of this kind may also be both joint and several.

Slingsby's Case, 5 Rep. 18. Jenk. 262.

19. Where a person covenants with two or more, and with each of them; if each of the covenantees takes a several interest or estate, the covenant is several; but if the covenantees take a joint interest in the subject matter of the covenant, it is a joint covenant. As if a man by an indenture demises to A. Black Acre, to B. White Acre, and to C. Green Acre, and covenants with them and every of them, that he is lawful owner of all the said acres; in that case, as the interests are several and distinct, the words, "every of them," will make the covenant several. But if the three acres had been demised to them jointly, then the words, every of them, would have been void. For a man by his covenant (unless in respect of several interests), cannot make it first joint, and then several, by means of the words, every of them. Because, although several persons may bind themselves, and every of them, and so the obligation shall be joint or several, at the election of the obligee; yet a man cannot bind himself to three and to each

of them, to make it joint or several at the election of several persons, for one and the same cause: for the Court would be in doubt for which of them to give judgement; also the covenantor would be several times charged with one and the same thing: and therefore the words, and every of them, are in such case of no effect, and do not sever the joint cause of action. Eccleston v. Clipsham, 1 Saund. 153. Johnson v. Wilson, Willes, 248.

20. If two lessees covenant jointly and severally at the beginning of a lease, these words will extend to all their subsequent covenants; notwithstanding the intervention of covenants on the part of the lessor.

21. In a lease of coal mines, made by the Duke of Northumberland to G. Errington and John Ward, there was a string of covenants introduced by these words: "And the said G. Errington and J. Ward for themselves jointly and severally, and for their several and respective heirs, &c.," and then came a proviso in these words: "and it was thereby declared by and between the said parties, and the said Duke did thereby covenant, that it should be lawful for the lessees to sell a certain quantity of a particular sort of coals, they the said G. Errington and J. Ward paying and accounting to the Duke for the same."—An action was brought by the Duke against the executors of G. Errington, upon these words; and the question was, whether they amounted to a several covenant. It was determined, that the general words at the beginning of the covenants by the lessees, "jointly and severally, in manner following," extended to all their subsequent covenants, which were therefore all joint and several. Northumberland v. Errington, 5 Term Rep. 522. Anderson v. Martin, 1 East, 497.

22. Covenants are divided into real and personal. Covenants real are those which have for their object Of Covenants Real.

1 Inst. 384 *b.* Jenk. 241.

something annexed to, or inherent in, or connected with land, or other real property. Thus, where three coparceners purchased lands in fee, and covenanted that the survivors should convey to the heirs of such as should die first: this was resolved to be a covenant real.

5 Rep. 16.

23. It was held in Spencer's case, that when a covenant extends to a thing in *esse*, parcel of the demise; the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised. But when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being. But if a lessee covenants to repair the houses demised to him, during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed to the houses.

Holmes v. Buckley, 1 Ab. Eq. 27.

24. A. granted a watercourse to B. and his heirs, through Black Acre and White Acre; and covenanted for himself, his heirs and assigns, to cleanse the same; and that fines and recoveries levied, &c. of the said grounds should be and enure to confirm, &c. Afterwards a recovery was had, and a deed executed, declaring the uses as aforesaid. The Court held, that this was a covenant real, and made good by the recovery.

Brewster v. Kitchin, 1 Ld. Raym. 317. 12 Mod. 171. Bally v Wells, 3. Wils. R. 25. Tatem v. Chaplin, 2 H. Black. 133.

25. A. tenant in fee simple granted a rent-charge out of lands, and covenanted for himself and his heirs to pay it without deduction. Lord Raymond held, that this was a personal covenant; but the other three Judges held, that this was a covenant real, being in the nature of a grant; or at least a declaration going along with the grant, showing in what manner the thing granted should be taken.

26. The essential distinction between a real and a personal covenant is, that a real covenant runs with the land, and descends to the heir; and is also transferred to a purchaser. Therefore, where a covenant real is entered into by a grantee or lessee, it will bind, not only such grantee or lessee, but also his assignee; and the grantor or lessor, or their heirs, may at any time bring an action on such covenant. Extend to all claiming under the Grantee. Spencer's Case, ante, § 23.

27. Thus, where in a lease for years the lessee covenanted with the lessor, his executors, and administrators, to repair, and leave in repair at the end of the term; in an action of covenant brought by the heir, it was objected that it lay not for him: but it was answered, that it was a covenant running with the land, and should go to the heir, though not named: and it appeared that it was intended to continue after the death of the lessor, his executor being named. Lougher v. Williams, 2 Lev. 92.

28. But where the lessor was only tenant for life, it was held, that his heir was not entitled to the benefit of covenants made with the lessor; because the lease determined by his death. Brudnell v. Roberts, 2 Wils. 143.

29. As assignees of grantees or lessees are bound by all covenants real, annexed to the estate granted or leased, and which run with the land; so are they entitled to the benefit of all such covenants as are entered into by the grantors or lessors; and may maintain an action on them. 1 Inst. 384 *a*.

30. Thus, in Spencer's case it was resolved, that if a person made a lease for years, by the words grant or demise, which create a covenant for quiet enjoyment; and the assignee of the lessee was evicted, he should have a writ of covenant. For it was but reasonable that he should have such benefit of the demise, as the original lessee might have had; and 5 Rep. 17 *a*.

the lessor had no other prejudice than that to which his special contract with the original lessee bound him.

31. By the statute 32 Hen. VIII. c. 34. § 2. it is enacted, that all feoffees and grantees of any lordships or hereditaments, for years, life, or lives, shall have the like action and remedy against all persons having reversions of such lordships or hereditaments, for any covenants contained in their leases, as they might have had against the lessors or grantors, their heirs or successors.

Vide Tit. 13. c. 2. § 53.

32. A court of equity will give its assistance to an assignee, against all persons claiming under the grantor of an estate; to procure for him the benefit of the covenants contained in the original grant, which run with the thing granted.

ante, § 24.

33. Thus, in the case of Holmes v. Buckley, the watercourse by mesne assignments came to the plaintiff; and Black Acre and White Acre to the defendant who built on the same, and much heightened the ground that lay over the watercourse, by which it became more chargeable and inconvenient to repair; and, as it was alleged, and in part proved, the building had much obstructed the watercourse. So the bill was for establishing the enjoyment of the watercourse; and that the defendant, and all claiming under him, might from time to time cleanse the same, according to the covenant. It was objected, that the covenant being personal, was not at all strengthened by the recovery; and that the plaintiff, and all those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charge. The Court was of opinion, that this being a covenant which ran with the land, was made good by the recovery; and though the plaintiff had cleansed

the same at his own charge, whilst it was easy to be done; yet since the right was plain upon the deed, and the cleansing made chargeable by the building, it was reasonable the defendant should do it, and decreed accordingly.

34. If, however, the tenant be not assignee of the whole term, he is then in fact only an under-tenant; and is not liable to an action for the breach of any of the covenants contained in the original lease. Exception. Under-tenants.

35. An action of covenant was brought for rent in arrear, against the defendant, as assignee to one Saunders. On the trial it appeared that the defendant was in possession of the premises during the time when the rent in arrear became due; but that, by the deed under which he held, they were conveyed to him by Saunders for a day or two less than the original term. For the plaintiff it was contended that the covenant for rent, being one of those which runs with the land, every person who took under the original lease, was liable to it. To this purpose the defendant, although he had not strictly taken the whole of the lessee's interest, in point of duration, was to be considered as his assignee. A devisee, an executor, an assignee under the bankrupt laws, or one who purchased a term from the sheriff under an execution, were assignees in law, to the effect of being liable to covenants for rent, &c.; although the transfer to them did not amount to a forfeiture, under a covenant not to assign. The landlord was entitled to look for the rent to the person in possession, and ought not to be driven to the necessity of finding out the original lessee, and bringing his action against him. Holford v. Hatch, Doug. 182.

On the other side it was insisted, that there was not a better known distinction in the law than that be-

tween an assignee and an undertenant. Only assignees of the whole term, whether by actual assignment, or by devise, sale under execution, &c., are liable to the covenants for rent, &c.; for if there was a reversion of a day reserved by the immediate lessor, there was no privity between the undertenant and the first lessor.

Lord Mansfield said, this was an action of covenant by a lessor against an underlessee; and the single question was, whether the action could be maintained against him, as being substantially an assignee. For some time the Court had great doubts; they had bestowed a great deal of consideration on the subject, and looked fully into the books; and it was clearly settled, and was agreeable to the text of Littleton, that the action could not be maintained, unless against an assignee of the whole term.

36. It was determined in a subsequent case, that where the whole of a term is assigned, and no reversion is left in the assignor, though the rent be reserved to the original lessee, and not to the lessor, the assignee will be entitled to the benefit of the covenants contained in the original lease.

Palmer v. Edwards, Doug. 186. n.

37. An action of covenant was brought by the plaintiff, as assignee of a term, against the defendant, as assignee of the lessor, for not providing proper timber for repairs. It was objected, that when the original lessee assigned over the term, the rent was reserved to such lessee, and not to the lessor; and that the covenants in the assignment made by the original lessee, were not the same with those in the original lease. On the other side it was contended, that wherever the whole interest is conveyed, it is an assignment; and that in such a case the assignee stood exactly in the place of the lessee, and was en-

titled to the benefit of all the covenants inserted on the part of the lessor.

The Court was of that opinon, and gave judgment accordingly.

38. Although assignees are liable to all the covenants that run with the land; yet that circumstance will not discharge the assignors, who will still continue liable to them. The Assignor is still liable.

39. An action of covenant was brought by the lessor of a house, against the lessee, for not repairing it, after warning given. The defendant pleaded, that long before the warning, he had assigned over his term to J. S., from whom the plaintiff afterwards received rent. It was determined that the action against the lessee was maintainable, notwithstanding the assignment, and acceptance of rent. Barnard v. Godscall, Cro. Ja. 309.

40. By the common law, covenants real descend to the heirs of the grantor, who may at any time bring an action upon them, though not named; as in the case of Lougher v. Williams: but no stranger could take advantage of a covenant of this kind; so that grantees of reversions could not enforce the performance of any covenants, contained in leases, made by the person under whom they derived. Descend to the Heirs of the Grantors. ante, § 27.

41. To remedy this the stat. 32 Hen. VIII. c. 34. was made; which has been already stated. This act extends to covenants as well as to conditions, it being thereby enacted, that the grantees and assignees of reversions shall have such like and the same advantages, by action only, for not performing the covenants contained in the said leases, as the lessors or grantors themselves, or their heirs or successors might have had. And go to the Grantees of Reversions. ante, § 31.

42. The general resolutions made on this statute will be found in Title XIII. It will therefore be suffi. c. 2. § 53.

5 Rep. 18 *a.* cient to observe here, that this act extends only to covenants which concern the thing demised, and not to collateral covenants. For the intent of the statute was not to transfer any privity of contract, but to annex the covenants, concerning the land demised, to the reversion; so that they might pass as incident, and annexed to such reversion.

Thursby v. Plant, 1 Saund. 237.

Webb v. Russell, 3 Term Rep. 393. 1 H. Black. 562.

43. In a modern case it was resolved by the Court of King's Bench, and affirmed in the Exchequer Chamber, that if a mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagor cannot maintain an action for the breach of these covenants; because they are collateral to his grantor's interest in the land; and therefore do not run with it. And Mr. Serjeant Shepherd, in arguing this case, stated that there were three relations at common law, which might exist between a lessor and lessee, and their respective assignees. First, privity of contract; which was created by the contract itself, and subsisted for ever between the lessor and lessee. Secondly, privity of estate; which subsisted between the lessee or his assignee, in possession of the estate, and the assignee of the reversioner. And thirdly, privity of contract and estate; which existed where both the term and reversion remained in the original covenantors. The statute 32 Hen. VIII. seemed to have created a fourth relation; a privity of contract in respect to the estate, as between the assignees of the reversion, and the lessees, or their assignees. The statute annexed or rather created a privity of contract between those who have privity of estate; and when the one fails, the other fails with it.

General and Specific Covenants.

44. A covenant to settle lands of a certain value is general, and does not bind any particular lands of the covenantor. But a covenant to settle particular lands is a specific lien on those lands.

Freemoult v. Dedire, 1 P. Wms. 429.

45. A person owed debts by bond and by simple contract, and upon his marriage had covenanted to settle his lands in Rumney Marsh, and also lands that should be of the value of 60 *l. per annum*, upon his wife for life. After which he made a will, thereby charging all his real and personal estate with the payment of his debts, and died.

On a bill brought by the creditors for the satisfaction of their several debts, Lord Parker said,—With regard to the lands in Rumney Marsh, the marriage articles being a specific lien on them, make the covenantor, as to them, but a trustee; and therefore, during the life of the wife, they are not to be affected by any of the bond debts. But the covenant for settling lands of the value of 60 *l. per annum* on the wife, does not specifically bind any lands. Wherefore, as touching that, the wife must come in only as a specialty creditor.

Usual Covenants for Title.

46. In all ancient feoffments, the feoffor entered into a general warranty for the title. But warranties have been long disused, and a set of covenants for securing the title have been substituted in their stead; which are now generally inserted in all conveyances, as being in some respects more beneficial to the grantees, and affording a more easy remedy, in case of a defect in the title, than could be obtained under the ancient warranty.

That the Grantor is seised in Fee, &c.

47. By the first of these, the grantor covenants for himself, his heirs, executors, and administrators, with the grantee, his heirs and assigns, that he the grantor is lawfully seised in fee simple of the premises conveyed.

And by the second, that he has good right and full power to convey the same.

Trenchard v. Hoskins, Winch. 91. Lit. Rep. 203. Sid. Rep. 328.

48. It appears to have been formerly doubted whether these clauses constituted two several covenants, or only one. But the better opinion appears to be, that they constitute two several and independent covenants; for although if the vendor be seised in fee he has power to convey; yet the converse of this proposition does not hold, for a person may have power to convey, though not seised in fee. Thus where a tenant in tail conveys to a person to make him tenant to the *præcipe*, in order that a common recovery may be suffered to the use of a purchaser in fee; or where a person conveys under a power, the covenant is, that the grantor has good right to convey, and the first covenant is omitted.

Grey v. Briscoe, Noy, 142

49. A person covenanted that he was seised of Black Acre in fee simple, whereas, in truth, it was copyhold in fee. The Court held it was a breach of covenant, and the jury should give damages, in their consciences, according to the rate at which the country valued fee simple land more than copyhold.

Nash v. Aston, T. Jones, 195.

50. Two men and their wives joined in a grant of their wives lands, being parceners; and covenanted that they and their wives had good right to convey the lands. It was affirmed for breach, that one of the women was under age, and died; and that the right of the lands descended to her son, an infant; and so the estate of a moiety was divested out of the plaintiff. This was held to be a breach of the covenant.

For quiet Enjoyment.

51. By the third of these covenants, the grantor formerly covenanted that the grantee, his heirs and assigns, should enjoy the premises granted, without the eviction or disturbance of the grantor or his heirs,

or any other person whatsoever. But this covenant is now much restrained, as will be shewn hereafter.

52. It was formerly held that a covenant of this kind extended to all evictions whatever. Thus, it was resolved in 15 & 16 Eliz. that where a person made a lease for a term of years, and covenanted that the lessee should enjoy the premises during the term, without the eviction or interruption of any person; this extended to a tortious eviction. Mountford v. Catesby, Dyer, 328 *a.*

53. This doctrine has however been long since exploded; and it has been settled that the law will never adjudge a person to covenant against the wrongful acts of strangers, unless his covenant is express to that purpose; for the law itself defends every one against wrong. And therefore, though a person should covenant in the most general terms, for the title to lands, yet such covenant will not be held to extend to tortious entries; for if a purchaser is tortiously evicted or disturbed, he has his remedy at law; and if he is legally evicted, he has his action on the covenant. Whereas if general covenants for a title should be construed to extend to tortious evictions, a way might be opened for secret practices, and combinations, between a purchaser and strangers; that the purchasers might recover damages from the covenantors. And this construction has been confirmed in the following modern case. Vaugh. 122. 2 Saund. R. 178 *a. n.* 8. 181 *a. n.* 10.

54. A person conveyed certain lands in the province of New York in America, to a purchaser, in consideration of 1,200 *l.*; and covenanted that the purchaser should enjoy the lands without the let, trouble, hinderance, &c. of the vendor or his heirs, and of every other person or persons whomsoever. The States of America seised the lands, for an act done previous to the conveyance. An action was brought in the Court Dudley v. Folliot, 3 Term R. 584.

of King's Bench at Westminster, on this covenant; and upon a demurrer, the Court was of opinion that the action did not lie; for even a warranty, which was conceived in terms more general than this covenant, had been restrained to lawful interruptions.

Noble v. Smith, 1 H Black. 34.

55. But where a person covenants to save the purchaser harmless from all acts of a particular person, there the vendor is bound to defend the purchaser against the entry of that person, whether by title or not.

Foster v. Mapes, Cro. Eliz. 212.

56. Thus, where a lessor covenanted to save harmless the lessee concerning the premises, and the profits thereof to be received, against J. D. parson of S.; afterwards the lessee was ejected by J. D. without title; the covenant was held to be broken.

57. So where the covenant is against all claims to a particular right, it will extend to tortious, as well as to legal claims.

Chaplain v. Southgate, 10 Mod. 384.

58. The defendant leased to the plaintiff a farm called Dale, and there being a pretence of a right of common set up to two closes, comprehended in the lease, the lessor covenanted with the lessee, that he should quietly enjoy the said two closes, against all claiming or pretending to claim any right in them. Upon this covenant the lessee brought his action, and assigned his breach, that such a one having or pretending to have a claim, time out of mind, did enter upon the said closes. To this the defendant demurred; and it was insisted by his counsel, that the covenant only extended to legal, not tortious claims; and therefore that the plaintiff should have set forth, that the claim of him who disturbed him was a legal one. But the Court was of opinion that the words of the covenant did extend to all interruptions whatsoever, and so was the plain intent and

meaning of the parties; for if it was to extend to legal claims only, then would the tenant be put under the hardship of trying the right for the landlord; which was the very thing the tenant plainly designed to prevent by the covenant. Judgment for the plaintiff.

59. Where lands are conveyed to particular uses, instead of a covenant for quiet enjoyment, the words usually inserted are, that the estates conveyed shall be and remain to the uses thereby declared without any eviction, &c.

Free from Incumbrances. Bro. Ab. Grant, 164. Touch. 167.

60. By the fourth of these covenants the lands are declared to be free from all incumbrances. And in 17 Edw IV. it was held, that if a person covenanted with another, to acquit him of all charges issuing out of the land, and after by parliament the tenth part of the value, out of the issues of all lands, were given to the King, the covenant should not extend to this. But if parliament had given the tenth part *exituum terræ*, the covenant would have extended to this, as well as to rents, commons, and such like things, wherewith the land is charged.

Hammond v. Hill, Com. Rep. 180.

61. In an action of debt upon a bond, where the condition was, that the defendant should keep harmless the plaintiff from all jointures, dowers, annuities, damages, claims, and all other incumbrances; and should perform a covenant contained in a certain indenture, whereby the defendant conveyed to the plaintiff and his heirs a messuage and lands, &c. and by the same deed covenanted, that the plaintiff should have, use, possess, and enjoy the premises aforesaid, quietly and peaceably, without any impediment from the defendant, his heirs or assigns, or any other person; and that clearly acquitted and exonerated of and from all former and other grants, &c. rents, rentcharges, arrears of rent, statutes, charges, and incum-

brances whatsoever. The plaintiff assigned for breach that the tenements were charged and chargeable with a rent of 11*s.* 6*d.* to be paid to the lord of the manor of W. of whom the said tenements were held, under the said rent and other services. The defendant by his rejoinder said that the rent of 11*s.* 6*d.* aforesaid was payable to the lord of that manor, as a quit rent, incident to the tenure of those lands; and that the plaintiff was not molested for any arrears of that rent, payable before the making of the indenture aforesaid. The plaintiff maintained his replication, and the defendant his rejoinder; and upon this there was a demurrer; and the question was, if this covenant was broken? and it was resolved by the whole Court, without any difficulty, that it was. For the defendant had expressly covenanted with the plaintiff upon his purchase, that he should have the lands discharged of all rents; and therefore they ought to be discharged of this rent, as well as of all others; for a quit rent is a rent; and judgment was given for the plaintiff.

For further Assurance.

62. By the fifth of these covenants, the grantor binds himself and his heirs to make all such further assurances of the lands as shall be lawfully and reasonably required by the grantee or his heirs, or their counsel.

Rosewell's Case, 5 Rep. 19 *b.*

63. It was resolved in 35 Eliz., that if a man bargains and sells lands in fee, and covenants to make further assurance, as the counsel of the bargainee shall advise; the bargainee himself, though he be learned in the law, cannot devise the assurance, but some of his counsel must devise it.

Higginbottom's Case, 5 Rep. 18 *b.*

64. It was resolved in 29 & 30 Eliz., that where a person was bound to make such assurance in the law as the counsel of the obligee, upon request made, should advise; and after J. S. was of counsel with

the obligee, and gave his advice to the obligee, that the obligor should make a certain assurance; and the obligee gave notice to the obligor of the said advice, and required him to perform it: he ought to perform it, otherwise the condition is broke. For it was more convenient that the counsellor should give his advice to the obligee, than to the obligor.

65. Where a man is bound to make such assurance as A. or his heirs, or their counsel, shall devise; A. or his heirs must take care that in time they have an assurance reasonably drawn, and ready to be sealed, and to tender it to him, that is, to seal it; for till then, there can be no breach of covenant. Touch. 167. Heron v. Freyne, 2 Ld. Raym. 750.

66. There is a clause in the register acts, 6 Ann. c. 35. § 30. and 8 Geo. II. c. 6. § 35., by which deeds of bargain and sale of lands lying in the east and north ridings of Yorkshire may be enrolled there. And that the words grant, bargain, and sell, in such deeds, shall operate as covenants for the title. infrà, c. 28.

67. Covenants for the title are real, and pass to the heirs of the purchaser, and to all persons claiming under him, who may maintain actions upon them against the vendor, his heirs and assigns, and also against his executors or administrators. Nor is it material whether the purchasers acquire their estates by common law conveyances, or by those derived from the statute of uses. Run with the Land.

68. The defendant by indenture enfeoffed J. S. of certain lands, and covenanted for himself and his heirs, with the feoffee, his heirs and assigns, to make further assurance upon request, which lands J. S. conveyed to the plaintiff, who brought an action on the covenant, because the defendant did not levy a fine upon the plaintiff's request. All the Court agreed that the covenant went with the land; and that the Middlemore v. Goodale, Cro. Car. 503.

Derival v. Custance, 4 Term R. 75.

assignee, at the common law, or at least by the statute, should have the benefit thereof.

Spencer v. Boys, 4 Ves. 370.

69. Rachel Boys and her son conveyed a copyhold estate to a mortgagee, by lease and release, and covenanted for further assurance. The son died; and the mortgagee filed his bill against the customary heir of the son, who was an infant; praying that he might be decreed to surrender the estate to the plaintiff.

The Master of the Rolls (Sir R. P. Arden) said he was clearly of opinion, that this covenant was a contract for a valuable consideration, affecting the land, and would affect the heir. And by the decree it was declared, that the covenant in the mortgage-deed bound the land descended to the defendant.

70. Covenants entered into by a purchaser with the vendor, respecting the land, or any thing issuing out of, or annexed to the land, will also run with it, and charge the heirs; and also the assignees of the purchaser, provided there is a privity of estate between them. But although there be a privity of estate at the time of the covenant, yet if a subsequent purchaser does not take the estate of the original purchaser, he will not be bound by the covenant; because there is no privity between him and the original vendor.

Roach v. Wadham, 6 East, 289.

Are now usually restrained.

71. Covenants for the title to lands have long ceased to be general, and are now usually restrained and qualified according to the nature of the vendor's title; sometimes to the acts of the vendor himself, sometimes to that of himself and his immediate ancestors. And although where covenants are several, and of distinct natures, restrictive words annexed to one of them will not be applied to the others; yet where all the covenants have the same object, and

Crayford v. Crayford, Cro. Car. 106.

restrictive words are annexed to the first of them, they will be considered as extending to all the others. Gainsford v. Griffith, 1 Saund. 58.

72. In an action of covenant, the plaintiff declared on a feoffment of lands, wherein the defendant's testator covenanted, that notwithstanding any thing by him done, he was seised in fee, &c. without any condition, &c.; 2dly, That he had full power to sell; 3dly, That the lands were clear of all incumbrances by him or his father; and, 4thly, That the feoffee should enjoy against all persons claiming under him, his father and grandfather; and assigned the breach, that the testator had no power to sell. Upon demurrer it was agreed, that these were distinct covenants; and three Judges, against North, Chief Justice, held, that when, by the first, he only covenanted against his own acts, it could never be intended that immediately, by another covenant of the same effect, he would covenant against the whole world. Nervin v. Muns, 3 Lev. 46. Broughton v. Conway, Dyer, 240.

73. In a conveyance of an estate in fee, the vendor, after warranting the lands to the vendee and his heirs, against himself and his heirs, covenanted, that notwithstanding any act done by him to the contrary, he was seised in fee, &c.; and that he had good right, full power, and lawful authority to convey and assure the same to the vendee, and his heirs and assigns, in manner aforesaid. The vendee was evicted by a person claiming under a title paramount to that of the vendor. An action of covenant was brought by the vendee against the representatives of the vendor; and it was contended upon his part, that the words good right, full power, &c. extended to all persons whatever, and consequently, that the vendee was entitled to recover his purchase money. But the Browning v. Wright, 2 Bos. & Pull. 13.

Court held, that these words were either a part of the preceding special covenants; or if not, that they were qualified by all the other special covenants, which restrained the covenants to the acts of the vendor and his heirs, and those claiming under him.

Howell v. Richards, 11 East, 633.

74. In a conveyance of lands made in 1783, the releasors covenanted, that for and notwithstanding any act, &c. by them or any or either of them done to the contrary, they had good right to convey; and also that they, or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise that the releasee should peaceably and quietly enter, hold, and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever; and that the releasee should be kept harmless and indemnified by the releasors, and their heirs, against all other titles, charges, &c. save and except the chief rent issuing and payable out of the premises to the lord of the fee.

The Court of K. B. held that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whatever, was not restrained by the qualified covenants for good title and right to convey, for and notwithstanding any act done by the releasors to the contrary.

According to the Title of the Vendor.

Post. Works. 110.

75. With respect to the restrictions annexed to the usual covenants for the title in modern conveyances, Mr. Fearne says,—"Regularly a vendor who purchases lands himself, with proper covenants from those who convey to him, cannot reasonably be required to covenant further than against himself and

those claiming under him. This is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor had them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor, for breach of his covenants, and transferred them to the purchaser by delivery of the deeds, and such vendee comes into the vendor's place in that respect, by the acquisition of such deeds; it would be unreasonable that the vendor should make himself liable for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself the peril or risk of such breach, and the duty of enforcing its remedy or compensation."

76. There are some exceptions to this rule, for where the title deeds are not delivered up to the vendee, the covenants should extend to the acts of the person from whom the vendor purchased the estate. Thus Mr. Fearne, in the opinion, of which a part has been already transcribed, procedes in these words:—" But this principle, I think, does not apply to those cases where the vendor does not depart with, nor the vendee acquire, the deed containing the covenants for the title against the acts of such grantors: whilst the vendor retains in his own hands the immediate means of indemnity, which he thought proper to require of his grantor, it seems but reasonable that he should engage for the like indemnity to his own vendee, and rely upon the indemnity he has obtained for his own counter-security. It is not, I think, sufficient to say that the covenant to produce

his purchase deeds will entitle the vendee to the benefit thereof, when produced. Such a covenant cannot ensure the production of them, which may be prevented by accidents, for which the vendor, in whose custody the deeds are, ought to be the sufferer, rather than the vendee; who, by not having such possession, could not in any degree be accessary to the occasion of their loss, or by any means or care have prevented it. There seems more reason on the other side to say, it is sufficient for the vendor that, when called upon by the covenants entered into by him to the vendee, for enjoyment, &c., he has his remedy over to the same extent, upon his grantors; of which, as he retains the means in his custody, he is bound to look to the preservation of those means, and liable to the resort to, and due enforcement of them, and to bear the consequence of their loss."

77. It would be impossible to lay down such a general rule on this subject, as would be applicable to the variety of cases that may occur in practice: but it follows, from the principles stated by Mr. Fearne, that where the vendor makes his title by descent, and his ancestors have been in possession of the estate for upwards of sixty years, he ought to covenant, not only against his own acts (which every vendor is bound to do), but also against the acts of all his ancestors. Where the estate has been purchased by an ancestor of the vendor within sixty years, who obtained proper covenants for the title from the person of whom he purchased, the vendor (giving up the title deeds) is only bound to covenant against the acts of such purchasing ancestor, and of those intermediate ancestors through whom the estate has been transmitted to him. And where the vendor has himself purchased the estate, and has obtained proper

covenants for the title, he is only bound (giving up the title deeds) to covenant against his own acts; for in each of those cases the purchaser will, by the possession of the title deeds, have a regular series of covenants to protect his title, up to that period when the statutes of limitations will secure him against all claims whatever.

78. Where the vendor derives his title under a will, or a voluntary conveyance, without any covenants for the title, he is bound to covenant against the acts of the devisor or grantor. And where an estate is sold by persons who have no beneficial interest, such as trustees, or assignees of a bankrupt, they are only bound to covenant, that they have done no act to incumber the estate. But where there is a defect in the title, a purchaser has a right to covenants against all persons, claiming a lawful title to the estate. And where a purchaser consents to take a defective title, relying for his security on the vendor's covenant, this should be particularly mentioned to be the agreement of the parties: for otherwise, as the defect was known, it might be contended that the covenants for the title should not extend to warrant it against such particular defect.

Lloyd v. Griffiths, infra.

79. With respect to the persons who are held to claim through the vendor, or any of those against whose acts the vendor covenants, or by their default, it was resolved in 20 Ja. I. that if a person purchases lands to himself and his wife, and to his heirs in fee; and then makes a lease for years of them to J. S., and covenants that the lessee shall quietly hold and enjoy the premises, without the let of the lessor, his heirs or assigns, or of any other person, by or through his or their means, title, or procurement; and after the lessor dies, and his wife enters and dis-

Who are held to claim under the Vendor, &c.

Butler v. Swinnerton, Palm. 339. Cro. Ja. 657.

turbs the lessee; the covenant is broken. For her claim is by means of her husband.

Palm. 340. 80. In this case Mr. Justice Doddridge said, if a tenant in tail, to whom the estate tail was made, created an estate, and covenanted as before, and the issue ousted the covenantee, the covenant was broken; because being his purchase, the descent to his issue was by his means, though not by his title. But if the issue made an estate, and covenanted in the same manner, and the issue of the issue entered, it was not broken, because they were in not by his means, but by descent. So if there was a lessee for life, with a remainder over, and the lessee made an estate, and covenant, and died, and the person in remainder entered, the covenant was not broken, because he was in by the feoffor, not by the lessee. But if a person enfeoffed another, upon condition to be re-enfeoffed for life, with remainder over, there it would be otherwise, because by his procurement and means.

Anon. Godb. 333. Palm. 340. 81. A person made a lease for life, and covenanted for himself and his heirs, that he would save the lessee harmless from any claiming by, from, or under him. The lessor died, and his wife brought a writ of dower against the lessee, and recovered; the lessee brought an action of covenant against the heir. It was adjudged against the heir, because the wife claimed under her husband, who was the lessor. But if the woman had been mother of the lessor, who demanded dower, the action would not have lain against the heir; because she did not claim by, from, or under the lessor. And so it was adjudged.

82. A person whose title is derived under a deed of revocation and appointment of new uses, must

be considered as a person claiming by or through the appointor.

83. Sir John and Lady Astley levied a fine of Lady Astley's estate, to the use of Sir John for life, remainder over; with a power to Sir John to make leases, and a joint power of revocation. They afterwards revoked the uses, subsequent to the estate for life and power of leasing to Sir John Astley, and appointed new ones, to Lady Astley for life, with intermediate remainders, remainder to Lord Tankerville in tail. Sir John Astley afterwards made a lease, not warranted by his power; and covenanted that the lessee should enjoy the premises, without any interruption from him, or any person or persons claiming or to claim, by, from, or under him. When Lord Tankerville's estate came into possession, he took advantage of the defect in the lease, and evicted the lessee; who brought his action upon the covenant against the executors of Sir John Astley: they pleaded that Lord Tankerville, at the time of his entry into the premises, and evicting the plaintiff, did not claim, nor was entitled to the premises by, from, or under Sir John Astley. Hurd v. Fletcher, Doug. 43.

Lord Mansfield said, justice was strongly with the plaintiff: that as Sir John Astley was a necessary party to the second declaration of uses, by which the estate was limited to Lord Tankerville, his Lordship certainly claimed under him, within the meaning of this covenant. That undoubtedly Sir John had covenanted against his own acts, and the new limitations were created by one of his acts. Judgment was given for the plaintiff.

84. Where a person conveyed an estate, and covenanted with the vendee for quiet enjoyment, without any eviction or interruption by the vendor, or Howes v. Brushfield, 3 East, 491.

any person claiming under him, or by, through, or with, his, their, or any of their acts, means, default, or procurement: and a quit rent was payable out of the lands, which became due before the vendor came into possession, but was in arrear at the time of the sale; it was held to be a breach of the covenant. And Lord Ellenborough said, if it were in arrear in the vendor's lifetime, it was a consequence of law that it was by his default, in respect of the party with whom he covenanted to leave the estate unincumbered.

Who are bound to covenant for the Title.

85. All persons who convey lands, in their own right, and for a valuable consideration, are bound to enter into the usual covenants for the title. And when the practice of conveying or devising lands to trustees, upon trust to sell, became frequent, it was laid down as a rule among conveyancers, that the persons entitled to the money to arise from such sale, were bound to enter into the usual covenants for the title. For as they had the beneficial interest in the land, they ought to be considered in equity as the owners.

Lloyd v. Griffiths, 3 Atk. 264.

86. T. Lloyd devised certain estates in the Isle of Anglesea, and county of Caernarvon, to trustees; upon trust, out of the rents and profits thereof, or by selling or mortgaging the same, to raise such sums as should be sufficient to discharge a mortgage affecting an estate which the testator had settled by deed on Mrs. Hester Webb, as also all his just debts. Upon a bill for carrying the trusts of the will into execution, the estates in Anglesea and Caernarvon were sold for 27,000*l.* and a draft of the conveyance was prepared by Mr. Booth, as counsel for the purchaser, to which Mrs. Webb was a party, and made to enter into the usual covenants for the title. The

counsel for the grantors, Mr. Weldon, together with Mr. Lane, objected to the draft, and gave their opinion that Mrs. Webb was not bound to enter into any covenants for the title. The draft was again referred to Mr. Booth, who supported his former opinion; and contended that where a person devised an estate to trustees, upon trust to sell and pay over the money to J. S., and the trustees contracted with a purchaser for the sale of the estate; there J. S., the devisee of the money, who had the real beneficial interest in the estate, must covenant for the title: and that this was every day's practice. The Master, to whom the draft of the conveyance was referred, reported, that Mrs. Webb was not bound to enter into covenants for the title.

Upon exceptions being taken to this report, Lord Hardwicke made the following order:—

"Let the exception be allowed, and let the Master alter the draft of the conveyance, by inserting therein proper covenants from Mrs. Webb, against her own acts, and the acts of Mr. Thomas Lloyd her devisor, as to so much as she would be benefited by the estate."

87. In a modern case, where an estate was devised to trustees, upon trust to sell the same for payment of debts, and the interest of the residue of the money was given to several persons for life, and after their deaths, the principal to go totheir children; it was held that the purchaser was not entitled to covenants for the title from the persons who took life estates; but still it may be laid down, that where the money to arise from the sale of an estate, is absolutely given to two or more persons, they are bound to enter into the usual covenants for the title.

Wakeman v. Dss. of Rutland, 3 Ves. 233. 504. 8 Bro. Parl. Ca. 145.

88. Where all the money to arise from the sale of an estate is to be applied in payment of debts, a

purchaser can only require a covenant from the trustees or devisees, that they have done no act to incumber. It is the same where a purchase is made from the assignees of a bankrupt.

Remedies under these Covenants.

89. With respect to the remedies to which purchasers are entitled under these covenants, they are of three kinds: 1°. Where the estate is evicted. 2°. Where it is incumbered. 3°. Where the defect in the title may be supplied by some further act. As to the first, where a purchaser is evicted by any person claiming under the vendor, or any of those against whose acts the covenants extend, he may maintain an action at law for the restoration of his money. But if the express covenants be not broken, he cannot get back his money.

Bree v. Holbeach, Doug. 654.

90. An administrator having found, among the papers of the deceased, a mortgage for 1200*l.*, assigned it over to a stranger, in consideration of the said sum of 1200*l*, which was paid to him; and in the deed of assignment the administrator covenanted that neither the deceased, nor himself, had done any act to incumber the mortgaged estate. The mortgage deed turned out to have been forged; and after six years had elapsed, the assignee brought an action of *assumpsit* against the administrator, for money had and received to the plaintiff's use. The defendant pleaded the general issue; and the statute of limitations. The plaintiff replied, and stated that the recitals in the indenture of assignment were false, inasmuch as there never was any indenture of mortgage, and that by fraud and imposition the plaintiff was induced to pay the said sum of 1200*l.* To this replication the defendant demurred generally.

Lord Mansfield.—" The basis of the whole argument is fraud, and the question is, whether fraud is any where asserted in this replication. There may

be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent; as in the case of Sir Crisp Gascoyne, who insured a life, and affirmed it was as good a life as any in England, not knowing whether it was or was not. There may be cases too which fraud will take out of the statute of limitations; but here every thing alleged in the replication may be true, without any fraud on the part of the defendant. He is administrator with the will annexed, who finds the mortgage deed amongst the papers of his testator, without any arrears of interest, and parts with it *bonâ fide*, as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed, as a true security, the case would have been very different; he did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it."

91. But if the purchaser be evicted before any conveyance to him is executed, having paid the purchase money, he may recover it back in an action for money had and received; even though the covenants in the intended conveyance do not extend to the title under which the estate was recovered.

Cripps v. Read, 6 Term R. 606. Johnson v. Johnson, 3 Bos. & Pull. 162.

92. A court of equity proceeds, in cases of this kind, upon the same principle as a court of law. For unless there is fraud, in concealing the defect in the title, the Court will not interfere.

93. William Davy devised certain estates to his son William for life, remainder to his first and other sons in tail male, remainder to Sir Robert Ladbroke and Lyde Browne, their heirs and assigns, as tenants in common; and devised all the residue of his real estate to his brother William Pate, his heirs and assigns for ever. Sir

Urmston v. Pate, in Chan. 1 Nov. 1794. MSS.

Robert Ladbroke died in the lifetime of the testator. William Davy, the son, entered on the estates, upon the death of his father, and died without issue; having devised his estates to John Minnyer, Robert Pate, and Thomas Butler, in trust to sell. William Pate, the residuary devisee in the will of William Davy, the father, devised his reversion expectant on the death of William Davy junior, to Robert Pate in fee. Barwell Browne, the heir of Lyde Browne, and Robert Pate, (who conceived himself, as residuary legatee in the will of William Davy, the father, to be entitled to the moiety devised to Sir Robert Ladbroke, and which became lapsed by his death in the lifetime of the testator), sold the estate for a valuable consideration to Urmston the plaintiff. The conveyance recited the will of William Davy the father, the death of Sir Robert Ladbroke in the lifetime of the testator, the death of William Davy the son without issue; and that William Pate, the residuary devisee in the will of William Davy the father, had made his will, reciting, that in case of the death of William Davy the son, without issue, he would become entitled to the moiety of the estate devised to Sir Robert Ladbroke, and had, by his said will, given the reversion of his said moiety to his son (the defendant), in fee. And there was inserted in it a covenant, that notwithstanding any act done by the defendant or his ancestors, or any person claiming under him or them, he was seised in fee of the premises. The purchaser afterwards discovering that Robert Pate had no title to the moiety conveyed to him, it having descended to William Davy the son, as heir to his father, and belonging to his devisees; filed a bill in Chancery against Pate, praying that his purchase money might be restored to him. The defendant demurred to

the bill for want of equity; and the demurrer was allowed. 3 Ves. Jun. 235.

94. Where any fraud or concealment is practised by the vendor, by which the estate is evicted, though by a person not claiming under the vendor, or any of those against whose acts the covenants for the title extend, the purchaser may bring an action on the case, in the nature of an action of deceit, against him: but a bill in Chancery will in most cases be found a better remedy; as it will lead to a better discovery of the concealment, and the circumstances attending it; and may in some cases enable the Court to create a trust in favour of the injured purchaser. And where the Court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the incumbrance, at the time of the sale. Harding v. Nelthorpe, Nels. 118.

95. With respect to incumbrances, if any are discovered after the execution of the conveyance, the purchaser has the same remedies as in cases of eviction.

96. With respect to defects in the title which may be supplied by the vendor; where any such are discovered, after the execution of the conveyance, the vendor may be compelled in equity to do whatever is necessary to supply such defect, by a bill for a specific performance of the covenant for further assurance. The transaction must however be free from all objection, otherwise the Court of Chancery will not compel the performance of a covenant for further assurance. Johnson v. Nott, 1 Vern. 271.

97. It is laid down by Lord Cowper that a covenant for further assurance will not help the case, where the original conveyance itself is void, so that if a man covenanted to stand seised to the use of a mere stranger, and covenanted to make further as- Prec. in Cha. 476.

surance, the covenant depending on the nature of the conveyance, if that were void, the covenant, which was only auxiliary, and went along with the estate, must be also void.

Covenants in Assignments of Leaseholds.

98. The usual covenants in assignments of leasehold estates, are, that the lease is valid in law, not forfeited, surrendered, or determined, or become void or voidable; that the assignor has good right to assign; that the rent has been paid, and the covenants performed, up to the time of the assignment; for quiet enjoyment during the term; free from incumbrances, without any restriction; and for further assurance.

Staines v. Morris, 1 Ves. & Beam. 8.

99. The assignee is also bound to covenant with the assignor, that he will pay the rent, and perform the covenants in future; and indemnify the assignor from the payment and performance thereof; and this latter covenant must be inserted, though the assignor, from his particular situation, is not bound to covenant for the title.

Covenants for Production of Title Deeds.

100. Where the title deeds of an estate are retained by the vendor, which frequently happens; either because they relate to a larger estate than that which is sold, or for any other reasons; the purchaser is entitled to a covenant from the vendor for the production of them, whenever it shall be necessary, in support of the purchaser's title. And this covenant being real, will run with the land, and extend to all future purchasers of it. But if the deed containing such covenant be not delivered to a future purchaser, he will then be entitled to a new covenant from his vendor for the production of the title deeds.

Vide Fearne's Post. 113.

Covenants for Renewal of Leases.

101. Covenants for renewal have frequently been inserted in leases; and are of two kinds; namely, covenants for granting another lease of the thing

demised; and covenants for renewal, not only on the expiration or surrender of the original lease, but also on the expiration or surrender of all future leases made under such a covenant, which is usually called a covenant for perpetual renewal.

102. Bridges demised a mill with the appurtenances, to Stapleton for 21 years; and covenanted that if the lessee, his executors, administrators, or assigns, or any of them, should at any time thereafter, before the expiration of the term thereby demised, be minded to renew and take a further lease of the said premises, that then upon application made, at any time before the last six months of the said term, the lessor, his heirs or assigns, should grant such further lease as should by the lessee, his executors, administrators, or assigns, be desired, without any fine to be demanded therefore, *and under the same rents and covenants only as in this lease.* Upon a bill filed in the Court of Exchequer by an assignee of the lease, against the lessor, to compel him to grant a further lease under the same rents and covenants as in the first lease; the Court decreed a new lease, which was settled by the Lord Chief Baron, and contained a covenant to grant a further lease at the end of the new term. Bridges v. Hitchcock, 5 Bro. Parl. Ca. 6.

The lessor appealed from this decree to the House of Lords, insisting that it was erroneous; for that the covenant for a further lease, after the expiration of the new lease, was in the nature of a perpetuity upon the appellant's estate; and might, according to the decree, be demanded from time to time continually; which was contrary to the intent and meaning of the covenant in the first lease, and of the parties thereto. To which it was answered by the respondent, that the covenant entered into by the appellant to grant

such further lease as should be demanded, under the same rent and covenants only as in the original lease, was the only foundation and encouragement which the parties had for expending so much money upon the demised premises as they had done, and accordingly it was the true intent and meaning of the covenant, that the lessee should be at liberty to renew as often as he should require.

The decree was affirmed.

Furnival v. Crewe, MSS. Rep. 3 Atk. 83.

103. Mr. Crewe, the defendant's grandfather, made a lease to one Moor for three lives, with the following covenants:—"And the said Tho. Moor, for himself, &c. covenants, grants, and agrees to and with the said John Crewe, &c. that he the said Tho. Moor, &c. shall at the death of any of the lives before mentioned, which shall first happen, pay unto the said J. Crewe, his heirs or assigns, within twelve months next ensuing such death, 68*l.* in the name of a fine, to add one other life to the remaining two lives, and so to continue the renewing this lease or leases, paying as aforesaid to the said J. Crewe, his heirs or assigns, 68*l.* for every life so added or renewed from time to time. And the said J. Crewe, for himself, his heirs, executors, and assigns, doth covenant and agree to and with the said T. Moor, his executors and assigns, that he the said J. Crewe, his heirs, &c. shall and will, for the consideration of the said 68*l.* as aforesaid, to be paid to the said J. Crewe, his heirs, executors, or assigns, at Crewe Hall, or at the place where the Hall now stands, seal and duly execute one or more lease or leases, under the same rents and covenants with these presents, and thereunto add such life or lives as shall be there and at such time nominated, to be added by the said Tho. Moor, his executors or assigns, within

the term or space of twelve months next after the death of any such life as aforesaid."

There were two several renewals, by adding a life in 1686 and in 1709; and in 1740 the last life in the original lease dropped, one of the added lives continuing still in being. The plaintiff Furnival, who was entitled to the leases, under several assignments, brought this bill against the defendant, Mr. Crewe, for a renewal of the leases, with the same covenants for renewal as in the original leases. The question was, whether under these covenants Mr. Crewe was now compellable to renew the lease; or whether the covenants should not be restrained to renewals only upon the original lives in the first lease.

Lord Hardwicke.—This bill is brought to have the benefit of two covenants contained in two several leases, made by Mr. Crewe the defendant's grandfather; the first of which leases was made when Mr. Crewe was tenant in fee of his estates, the other after a voluntary settlement, whereby Mr. Crewe was become but tenant for life: but this last lease being made for a valuable consideration, must prevail against the settlement. None of the original lives dropped during Mr. Crewe's own life, but after his death there were renewals, with the same covenants added as in the original leases; and now that all the original *cestuis que vie* are dead, the question arises upon the construction of these two covenants, and whether the obligation on the part of the tenant to pay the fine, and on that of the landlord to grant a new lease, was intended to be perpetual. And I am of opinion that the plaintiff is entitled to a renewal of the leases, with the same covenants for renewal; and that these were intended for perpetual subsisting leases. It has been contended that the words in

Moor's covenant, so to continue renewing, &c. could mean only the adding a life upon the falling in of any of the original ones, but not upon an added life. But this construction satisfies not the intent, which was not the continuing of the estate, barely by giving a life, but by filling up the estate, for it is not only said lease, but leases; and the word *or*, is here to be taken for *and*, to satisfy the intent, which was to take in the new leases, the last as well as the original one; and the covenant on the part of the lessor to grant under the same rent and covenants, takes in the covenant for renewal. The words, *next after the death*, are not to be confined to the lives in the original lease, but extend to any, whether in the original, or added upon renewal; and this appears from the making the fine payable at Crewe Hall, or the place where the Hall now stands; which words, though they may be said not to be of much weight, yet are an evidence of the intent, that the lease might continue so long as time endured; since neither lessor nor lessee could have it in view that Crewe Hall, the family seat, might be demolished in three lives. It has been objected that no breach could be assigned against the heir or executor of the lessor, in an action of covenant; but I think there might, either by the lessor or lessee; and if so, a court of equity may properly relieve, provided there be no objection against granting such relief; either from the nature of the covenant itself, or the condition of the person seeking the benefit of it. 1st. Because the covenant being for making an estate in land, a court of equity can give the thing itself, which is the highest and most adequate remedy; damages only being recoverable at law. 2d. Because at law the remedy could only be against the representative of the lessor, out of the lessor's assets,

which would be recovering out of another's pocket; whereas this is against the land itself. It was next objected, that covenants for perpetual renewals were not to be favoured, being in effect an engaging the inheritance. But this being a contract for a valuable consideration, must be performed; and as Mr. Crewe the grandfather might have sold the fee, so might he lay what charges he pleased upon it, in the hands of those who came after him. In England, indeed, these covenants are rare; but in Ireland they are very frequent. Then it was said that the consideration is not adequate; but I cannot from the evidence judge of that, either one way or the other. And this is a much more favourable case than that of Bridges v. Hitchcock, or Hyde v. Skinner, since in neither of those was any fine to be paid; whereas, in the present, a fine is payable upon every renewal; and so a benefit stipulated for the successors. Another objection was made against renewing, that the successors might not all of them have such an estate as would enable them to renew. But I think the renewal may and must be made according to the nature of the defendant Mr. Crewe's estate; and if he be but tenant for life, though he cannot covenant for his heirs, yet he may for himself and all claiming under him. The case of Doctors Commons v. Dean and Chapter of St. Paul's, heard by Lord King, assisted by Lord Raymond & J. Price, and which afterwards went up to the House of Lords, was decreed upon a particular reason. There the Lords confined it to one renewal, because the contrary construction would have been going against the restraining statutes, whereby ecclesiastical persons can grant but for a particular term. That of Hyde v. Skinner is of no authority; it was a lease without any fine paid, or agreed to be paid;

ante, § 102.

1 Bro. Parl. Ca. 240.

and by the report seems more like an award or compromise than a decree. But that of Bridges v. Hitchcock is an authority in point, only not so strong as the present. There was a lease for 21 years without any fine or covenant on the part of the lessee; as there is here only a covenant on the lessor's part, to grant a new lease, *with the same covenants;* and there, upon the words *same covenants*, the Court decreed the new lease to have the like covenant for renewal; and though it was said there had been great improvements, yet two terms might well be thought a reasonable satisfaction. I therefore think the plaintiff entitled to a renewal, under the same rents and covenants: but it must be such as Mr. Crewe's estate will enable him to make.

Cooke v. Booth, Cowp. 819.

104. A case was sent out of Chancery by Lord Bathurst, for the opinion of the Court of King's Bench, stating as follows:—That Robert Booth by indenture demised certain premises to Otho Cooke, for the lives of the lessee and two other persons; and covenanted that if the said Otho Cooke, his heirs and assigns, should be minded, at the decease of the three persons named in the lease, or any of them, to surrender his indenture and take a new lease of the said premises, and thereby add one new life to the then two in being, in lieu of the life so dying; that then the said R. Booth, his heirs, &c. upon request, on such surrender of the lease then in being, and upon payment of a broad piece of gold, to the said R. B. his heirs, &c. for every life so to be added, in lieu of the life of every of them so dying, and at the proper cost of the said Otho Cooke, without demanding any further fine for the same, should grant and execute unto the said Otho Cooke, his heirs, &c. a new lease for the lives of the two persons named in the former lease as

should be then living, and of such other person as the said O. Cooke, his heirs or assigns, should nominate and appoint, in lieu of the person named in the preceding lease, as the same should respectively happen to die, under the before-mentioned annual rent, and the same covenants therein contained. The lease was dated in 1740, and there had been successive renewals, containing the same clause of renewal from the time of a former lease granted by the ancestor of Robert Booth in 1688, down to the date of the lease in question. In 1773, a new lease (one of the lives having dropped) was tendered to the landlord in the same terms as the former leases, which he refused to execute, because it contained a covenant for renewal.

Lord Mansfield said, the question in all these cases was, whether *under the same rents and covenants* should be construed inclusive or exclusive of the clause of renewal; and arguments drawn from every part of the agreement were material. Here the parties themselves had put the construction upon it, for there had been frequent renewals, and in all of them the covenant for renewal had been uniformly repeated. How then should the Court say the contrary?

The Court certified their opinion, that a like covenant for renewal ought to be inserted in the new lease.

105. The principle upon which the Court of King's Bench founded their opinion in this case, has been since frequently denied. Lord Alvanley, when Master of the Rolls, has said—"I strongly protest against the argument used by the learned Judges in Cooke v. Booth, as to construing a legal instrument by the equivocal acts of the parties, and their understanding 3 Ves. 298.

upon it, which I will never allow to affect my mind. That case was sent to law by Lord Bathurst: the learned Judges thought fit to return an answer to the Chancellor, that the legal effect was a perpetual renewal, upon the ground that by voluntary acts, which the parties might or might not have done, the parties themselves had put a construction upon it. Lord Mansfield made it his chief ground; but that ground was disapproved by Lord Thurlow, and is, I think, totally unfounded. I never will construe a covenant so. I never was more amazed, and Mr. Justice Wilson, who argued it with me, was astonished at it. When it came back, Lord Bathurst, not having retained the great seal long enough for it to come before him again, it came before Lord Thurlow, who said, that sitting as Chancellor, when he asked the opinion of a court of law, whatever his own opinion might be, he was bound by that of the court of law: therefore he decreed a renewal; but said he should be very glad if Mr. Booth would carry it to a superior tribunal. We had a consultation, and I wrote to Mr. Booth upon it, but he, being only tenant for life, refused to appeal."

Vide 6 Ves. 238. 9 Ves. 333. Iggulden v. May, infra.

106. An opinion appears to have formerly prevailed, founded on the authority of the case of Bridges v. Hitchcock, that a covenant to renew a lease, *under the same rent and covenants* as those contained in the original lease, created a right to a perpetual renewal, the covenant for renewal being included. But this doctrine has been long since exploded; as appears from the following cases.

Hyde v. Skinner, 2 P. Wms. 196.

107. One Skinner, possessed of a long term for years of a house, leased it for five years, and covenanted for himself and his executors to renew this lease at the same rent, and on the same covenants,

upon the request of the lessee within the term. Lord Macclesfield decreed a new lease for 21 years, but said, that though the lease was to be made on the same covenants, yet that should not take in a covenant for the renewing the new lease; forasmuch as then the lease would never be at an end.

Davis v. Taylor's Compy Harg. Jur. Argum. vol. 2. 427.

108. In a lease made by the defendant to plaintiff's testator, of a house for 21 years, there was a covenant that the defendants, at the end of the first seven years, would, upon the surrender of that lease, make a new lease for the term of 21 years, at the same rent and with the same covenants as were reserved and contained in the old lease. The bill was for a specific performance of this covenant: and the question was, if the covenant for renewal should be inserted in the new lease.

Sir Joseph Jekyll, M. R. was of opinion it should not, there being no words to show that it was the intention of the parties that the lease should be renewed *toties quoties*; for that in effect would be to give the plaintiff a fee. And therefore decreed the defendant to make a new lease, but without the covenant for renewal.

Russell v. Darwin, 2 Bro. Rep. 639. *note.*

109. Lord Molyneux and his wife demised a farm for a term of 99 years, if three persons or any of them should so long live, rendering rent; and Lord M. covenanted, for himself and his wife, their heirs and assigns, that he and they would, upon the death of any of the lives named in the lease, add a new third life upon payment of 200*l.* within six months; or upon the death of two of them, add two new lives, upon payment of 500*l.*; or upon the death of all of them, would, upon payment of 1,150*l.*, make a new lease or grant for any three new lives, to be nominated and appointed by the lessee, his executors, ad-

ministrators, or assigns, for the like term as was thereby demised; at and under the like rent, covenants, and agreements therein contained. Upon the death of the survivor of the lives mentioned in the original lease, the lessee applied for a renewal, and tendered the ingrossment of a lease for 99 years, renewable upon the dropping of three new lives, at the old rent; with a covenant for renewal of that lease, to the same effect as had been contained in the original lease; tendering at the same time the fine of 1,150*l.* The defendants declined executing the lease, with such covenant; whereupon the lessee filed his bill to compel the defendants to execute such new lease, with such covenant of renewal.

Lord Camden was of opinion that the defendants were not under any obligation to grant any further lease, than for three new lives only; and that the plaintiff was not entitled to have any covenant inserted for any further renewal; the words of the old covenant not obliging the lessors to grant a new lease, but upon the death of some one of the three persons named in that lease; and they being all dead, the plaintiff could claim no further renewal: and therefore decreed a new lease for 99 years, renewable on the death of three persons named in the prepared lease, but without any covenant for any further renewal.

Tritton v. Foote, 2 Bro. Rep. 636.

110. A lease was made for 21 years, in which there was a covenant on the part of the lessor, that he, his executors, &c., should at the end of the said term of 21 years, seal and execute a new lease of the said premises, for the further term of seven years; subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements, in all respects, as were in and by the said indenture of lease mentioned and expressed, in

case the lessee, his executors, &c. should desire the same.

Lord Thurlow said, he had not an idea that the intention of the lessor was, to renew the covenant of renewal; or that it could be so construed in a court of equity.

111. Lord Foley made a lease for three lives, with a covenant for renewal under the like rent, covenants, provisoes, and conditions, as were contained in the original lease. Moore v. Foley, 6 Ves. 232. 2 Cox's Rep. 174.

Sir W. Grant, M. R. said he agreed with the late Master of the Rolls (Sir R. P. Arden), who says—"I collect therefore from these cases this, that the Courts, in England at least, lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear that the covenant does mean it. Furnival v. Crewe, which is relied on in Cooke v. Booth, had clear words for a perpetual renewal, which made it impossible to construe it otherwise." And said—There being no clear words in this case, nor any words relative to perpetual renewal; the question is, whether the proviso, that the renewal shall be under the same rents, covenants, and conditions as the first lease, shall, in the absence of more positive stipulations, amount to a perpetual renewal. Upon Tritton v. Foote, and Russell v. Darwin, I am bound to hold that a covenant for renewal under the same covenants, does not include the covenant to renew; but that it means only a second lease, not a perpetuity of leases. 3 Ves. 295.

112. J. Dilnot, by indenture of lease dated 29th September 1783, demised certain premises in Deal to three persons for 21 years, at the rent of 6*s.* 9*d.* And the lessor covenanted that he, his heirs and assigns, at the end of 18 years of the said term of 21 years, or before, upon request, would make to the Iggulden v. May, 9 Ves. 325. Hargrave's Juris. Exer. vol. 3. 222.

lessees a new lease for the like fine, at the like yearly rent of 6*s.* 9*d.* payable as aforesaid, "with all covenants, grants, and articles," as in the said lease were contained: and this was the only covenant in the lease.

After the expiration of 18 years from the execution of the lease, Iggulden, who was assignee of the lease, applied to J. May, to whom Dilnot had sold the estate, for a new lease, upon the terms contained in the clause for renewal. May, objecting to grant a lease containing a similar covenant for renewal, a bill was filed. The question was, whether the plaintiff was entitled to a lease, containing that covenant. The answer admitted that for a great number of years, and particularly from 1747, leases of these premises had been granted to the plaintiff's father, and the several persons under whom he claimed, similar to the lease of 1783.

Lord Eldon said, he was clearly of opinion the construction of this covenant must be the same in equity, as at law: that the acts of the parties had nothing to do with the construction: that this lease must be construed precisely as the first lease. Also he was of the same opinion as Lord Alvanley and Sir W. Grant, that the general doctrine was, that where a lease was made without more than the general words, they would not impose an obligation to insert a covenant for renewal. The bill was retained for 12 months, with liberty to bring an action.

7 East, 237. Moore v. Foley, 6 Ves. 232. City of London v. Mitford, 14 Ves. 53.

113. An action of covenant was accordingly brought in the Court of King's Bench, and Lord Ellenborough delivered the opinion of the Court, that the plaintiff was not entitled to require the execution of a lease to him, containing the covenant of renewal.

114. The right of renewal may be forfeited by the laches of the tenant, in not applying for a renewal within the time mentioned in the lease.

115. The Marquis of Carnarvon demised certain lands to Thomas Landon, his executors, &c. for 99 years, if three lives therein named should so long live; with a covenant to renew, and a proviso that if the lessee, his executors, &c. refused or neglected to renew the said lease, or to make application therein after the death of the first or any of the lives, for two years, then the lease should be void. The lessee neglected to renew on the death of the two first persons whose names were in the lease: but within a year after the death of the last life he applied for a renewal.

Baynham v. Guy's Hospital, 3 Ves. 295.

The Master of the Rolls (Sir R. P. Arden) was clearly of opinion, that the lessee had not entitled himself to the benefit of the covenant; therefore the right of renewal was forfeited.

TITLE XXXII.

DEED.

CHAP. XXVI.

How Deeds may be avoided.

1. *Disclaimer or Disagreement.*
6. *Duress.*
8. *Erasure or Interlineation.*
12. *Breaking off the Seal.*
14. *Cancelling.*
19. *Averment of Usury.*
23. *Equity avoids Deeds obtained by Fraud.*
34. *Or made in Derogation of the Rights of Marriage.*
44. *Or for an immoral Consideration.*
54. *All Deeds are void as to Crown Debts.*
61. *The Crown entitled to a Term attendant.*

SECTION 1.

Disclaimer or Disagreement. Bro. Ab. Tit. Disclaimer, 54. Tit. Joint Tenant, 570.

DEEDS may be avoided in several ways, and for several reasons. Thus, in the case of a deed poll, the grantee may disclaim the estate intended to be given; in which case no estate will vest in him. But in the case of an indenture, if the grantee executes it, he thereby accepts the estate limited to him.

3 Rep. 26 *a.*

2. It is said that a disclaimer of a freehold estate must be in a court of record, because a freehold shall not be divested by bare words in *pais*. But in the case of terms for years, which are only chattels real, an assignee of them may refuse in *pais;* and by such refusal the interest will be divested.

Smith v. Wheeler, 1 Vent. 128.

Bro. Ab. Tit. Done, 7.

3. If a lease is made to A. for life, remainder to B., and after A. dies, the law adjudges the frank tenement in B. till he disagrees or disclaims; and by the waiving thereof it vests in the donor or his heir.

4. A lease for life was made to B., remainder to C. and D. in tail. It was holden that C. and D. could not disagree to the remainder, without matter of record; for they were tenants in common. But if the remainder had been limited to them in fee, so as they took jointly, it had been otherwise; for then, by the disagreement of the one, the other should take the whole lands. Anon. 4 Leon. 207.

5. It has been stated that every grantee in a deed takes the estate granted, till some disagreement appears on his part. And it is now settled, that in such cases the grantee may, by deed only, disagree, and disclaim the estate, by which it will be divested out of him. Ante, c. 1. § 29. Hawkins v. Kemp. 3 East, 410. Crewe v. Dicken, Tit. 12. c. 4. § 35.

6. All deeds executed by persons under duress of imprisonment, or duress *per minas*, are void. Thus, if a person is put under any illegal restraint or confinement, until he executes a deed, he may allege this duress, and thereby avoid the deed. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, executes a deed, he will not be allowed to avoid it. Duress. 2 Inst. 482. Strathmore v. Bowes, infra.

7. If a man, through a reasonable and well-founded fear of death, or mayhem, or loss of limb, is forced to execute a deed, he may afterwards avoid it. But Lord Coke says it is otherwise where a deed is executed for fear of battery, which may be very light; or burning his houses, or taking away or destroying his goods, or the like; for there he may have satisfaction, by recovery of damages. 2 Inst. 482.

8. A deed may be avoided by erasure or interlineation. And in Pigot's case it was resolved, that when any deed is altered in a part material, by the plaintiff himself, or by any stranger, without the privity of the obligee; be it by interlineation, addi- Erasure or Interlineation. 11 Rep. 26.

tion, rasing, or by drawing a pen through the midst of any material word; the deed becomes void. But in a modern case the Court of K. B. appears to have held, that an alteration by a stranger, or a mere spoliator, would not invalidate a deed.

Henfree v. Bromley, 6 East, 309.

7 Rep. 27 *a.*

9. If the obliteration be made by the party who owns the deed, although it be in a part not material; or that it is to the advantage of the other party, and to his own disadvantage; yet the deed will be rendered void. But if the alteration be made by a stranger, in an immaterial part, without the privity or consent of the owner, it will not make it invalid.

Trowell v. Castle, 1 Keb. 22.

10. An interlineation, if nothing appear to the contrary, will be presumed to have been made at the time when the deed was executed, and not after: and it has also been held, that an interlineation by which a power of sale was enlarged, should be presumed to have been made at the time of the execution of the deed, and not after; if nothing appeared to the contrary.

Fitzgerald v. Fauconberg, Fitzgib. 204.

11. The modern practice is, when any alteration, interlineation, or erasure is made in a deed, before it is executed, to take notice of it in the attestation.

Breaking off the Seal. 2 Rep. 22 *b.* Cro. Eliz. 408. Seaton v. Henson, 2 Show. 29. Nichols v. Haywood, Dyer, 59 *a.*

12. It was formerly held, that if the seal of a deed was broken off, or so defaced, that no sign or print of it could be seen; unless the person who was bound by the deed did it; such deed became void. This doctrine was however soon altered; and it was settled, that if there was reason to presume that the seal of a deed had been torn off by accident, or destroyed by time, the deed should notwithstanding be deemed valid.

Argol v. Cheyney, Palm. 403.

13. The seals of a deed to lead the uses of a recovery were broken off; but it being proved that seals were once annexed to it, and that they were

torn off a by little boy; and the parts torn off being compared with the deed, and agreeing, it was held to be valid.

14. If a deed be delivered up to be cancelled, to the party who is bound by it, and it is accordingly cancelled, by tearing off the seals, or otherwise defacing it; or if the person who has the deed cancels it, by agreement with the other party; it becomes void. Cancelling. Touch. 70.

15. But where an estate has actually passed by a deed, the cancelling of such deed afterwards will not divest any estates out of the persons in whom they were vested by that deed. Leech v. Leech, 2 Cha. Rep. 52.

16. A father having quarelled with his eldest son, made a settlement on his wife of 100 *l.* a year, in augmentation of her jointure. Afterwards, being reconciled to his son, he cancelled the deed, and so it was found at his death. On a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled. Hudson's Case, Prec. in Cha. 235.

17. In setting forth a conveyance, it was stated, that a deed of release was cancelled, by the releasor's seal being torn off, and destroyed; and that part of the deed was lost, with a *profert in curia* of the residue. It was held to be good pleading; and Lord Ch. J. Eyre said—"I hold it clearly that the cancelling a deed will not divest property, which has once vested, by transmutation of possession. And I would go farther and say, that the law is the same with respect to things that lie in grant. In pleading a grant, the allegation is, that the party at such a time did grant. Bnt if by accident the deed is lost, there are authorities enough to show, that other proof may be admitted. The question in that case is, whether the party did grant. To prove this, the best Bolton v. Carlisle, 2 H. Black. 259.

evidence must be produced, which is the deed: but if that be destroyed, other evidence may be received, to show that the thing was granted. For God forbid that a man should lose his estate, by losing his title deeds."

Roe v. Archb. of York, 6 East, 86.

18. Where a tenant for life, with a power of leasing, in consideration of the surrender of a prior term, granted a new lease, which was void; it was held that the prior term, though the indenture of lease was in fact cancelled, and delivered up, when the new lease was granted, might be set up by the tenant, in bar to an ejectment brought by the remainder-man, after the death of the tenant for life.

Averment of Usury.

19. By the several statutes against usury, particularly that of 12 Ann. st. 2. c. 16, it is enacted, that no person shall take, directly or indirectly, for the loan of any monies, wares, merchandizes, or other commodities whatsoever, above the value of five pounds for the forbearance of 100*l.* by the year; and so after that rate for a greater or lesser sum, or for a longer or shorter time. And that all bonds, contracts, and assurances whatsoever, for payment of any principal money to be lent, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred as aforesaid, shall be utterly void; and the person taking above 5*l.* for the forbearance of 100*l.* for a year, shall forfeit treble the value of the monies, &c. so lent.

Chesterfield v. Jansen, 2 Ves. 142. Murray v. Harding, 2 Black. R. 859.

20. These statutes do not extend to *post obit* bonds, or to the purchase of annuities for lives; where the purchaser's principal is *bonâ fide*, and not colourably, put in jeopardy. For in that case no inequality of price will make it an usurious bargain.

Tit. 15. c. 4. § 56.

21. By the statute 14 Geo. II. all mortgages of estates or other property in Ireland, or in the colo-

nies or plantations in the West Indies, bearing the interest allowed in those countries, shall be legal; though executed in Great Britain: unless the money lent shall be known at the time to exceed the value of the thing or pledge. In which case also, to prevent usurious contracts at home, under the colour of such foreign securities, the borrower shall forfeit treble the sum borrowed.

22. It has been held that this statute only extends to bonds given as collateral securities, for the payment of the principal and interest lent on such mortgages; and not to any other bonds, or personal securities. Dewar v. Span, 3 Term R. 425.

23. Although the courts of common law have a jurisdiction in all matters of fraud, and may avoid deeds upon that ground, yet the usual practice has long been to seek redress in equity, against deeds that have been fraudulently obtained; because a court of equity will allow of a great number of averments, and will admit of several kinds of evidence, not received in courts of law. Equity avoids Deeds obtained by Fraud.

24. The cases which have been decided on this head are however so various, and each of them depends so much on its own particular circumstances, that only a few general principles can be deduced from them.

25. It may however be laid down, that ignorance and misapprehension of the party, is a ground on which courts of equity have sometimes avoided a deed. But equity will not interpose, if the fact was from its nature doubtful; or equally known to both parties, at the time of the agreement. Treat. of Eq. B. 1. c. 2. § 7.

26. It is not every surprise that will avoid a deed duly made, nor is it fitting; for it would occasion great uncertainty, as it would be impossible to fix Idem, § 8.

Whitfield v. Taylor, Tit. 7. c. 2. § 5.

what was meant by surprise. For a man may be said to be surprised, in every action which is not done with as much discretion as it ought to be. But the surprize here intended must be accompanied with fraud, and circumvention. There must either be *suppressio veri*, or *suggestio falsi*. And then it must be fully proved; for fraud is a thing odious in law, and never to be presumed.

Broderick v. Broderick, 1 P. Wms. 239.

Treat. of Eq. B. 1. c. 2. § 9, 10.

Picket v. Loggon, 14 Ves. 215.

Huguenin v. Barclay, Id. 273.

27. Inadequacy of consideration is a ground upon which a court of equity has sometimes avoided a deed; provided it be such as to show that the person did not understand the bargain he made, or was so oppressed, that he was glad to make it, knowing its inadequacy: for these circumstances will show a command over him, which may amount to a fraud. But there is no case in which it has been held, that mere inadequacy of price is a ground for a court of equity to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed. Still less does it seem to have been considered as a ground for rescinding an agreement actually executed.

Gwynne v. Heaton, 1 Bro. R. 1.

Peacock v. Evans, 16 Ves. 512.

Vide Bro. Parl. Ca. Tit. Fraud.

Treat. of Eq. B. 1. c. 4. § 10.

Hall v. Potter, Show. Parl. Ca. 76.

Cole v. Gibson, 1 Ves. 503.

28. Bonds for money, or beneficial leases, taken as rewards for procuring marriages, will be set aside in equity: because such transactions tend to induce executors, trustees, guardians, and others, connected with persons of fortune, to betray them into improper marriages.

Tit. 25. § 82.

29. Bonds or other securities given for the purpose of obtaining appointments to offices of trust under government, are also void.

Tit. 12. c. 4. § 48.

30. It has been stated in a former title, that trustees are not allowed by the Court of Chancery to become purchasers of the estate. This rule is extended

to assignees of bankrupts, and solicitors. And in a late case, a purchase of a bankrupt's estate, by the solicitor to the commission, was set aside, though he gave the full value for it, at a public auction. And Lord Eldon declared, he would set aside all purchases made by persons having a confidential character, however honest the circumstances. Ex par. James, 8 Ves. 337.

31. It has been determined by the House of Lords that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time that he continues to conduct or manage the affairs of the donor, shall be permitted to stand. Middleton v. Willis, Bro. Parl. Ca. 245. 1 Cox. R. 112. 12 Ves. 371.

32. Weakness of understanding is also a ground upon which a court of equity will invalidate a deed. But Lord Thurlow has observed, that there is an infinite, nay an insurmountable difficulty, in laying down abstract propositions, upon a subject which depends on such a variety of circumstances, as the legal competency of the mind, to the act in which it is engaged; if its competency be impeached by positive evidence of an anterior derangement, or affected by circumstances of bodily debility, sufficiently strong to lead to a suspicion of intellectual incapacity. Att Gen. v. Parnther, 3 Bro. R. 441.

33. " If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval; who must show sanity and competence at the period when the act was done, and to which the lucid interval refers. And it certainly is of equal importance, that the evidence in support of the Idem. Lewis v. Pead, 1 Ves. Jun 18.

14 Ves. 91. 273. Say v. Barwick, 1 Ves. & Bea. 195.

allegation of a lucid interval, after derangement at any period has been established, should be as strong and demonstrative of such fact, as where the object of the proof is to establish derangement."

Or made in Derogation of the Rights of Marriage.

34. If a woman on the point of marriage charges or conveys away her estate to a stranger, without the knowledge of her intended husband; such charge or conveyance will be held void in equity; being in fraud of the right which the husband acquired to his wife's property by the marriage.

Lance v. Norman, 2 Esp. Cha. 4.

35. Thus, a recognizance entered into by a woman the day before her marriage, was set aside, and a perpetual injunction granted; though one witness deposed that the husband consented to the drawing of it; but that witness had an assignment of it himself.

36. So where a widow made a conveyance of her estate, prior to her marriage, and without the privity of her intended second husband; it was decreed that the second husband should enjoy the estate notwithstanding.

37. It has been determined, upon the same principle, that a conveyance made by a woman, before her marriage, without the privity of her intended husband, to trustees for her separate use, was void against the husband.

38. Lord Hardwicke has said, that if a woman about to marry, gives away a part of her property, or gives a security or assignment of it, they are relievable against in Chancery. But where a debt is contracted for a valuable consideration, though concealed from the husband, it is no fraud on the marriage.

39. Where a widow assigned over the greater part of her property to trustees, in trust for herself during

her widowhood, and in the event of her marrying again, in trust for her second son; but the conveyance was made publicly, and prior to the marriage-treaty with her second husband; on a bill filed by the husband, to set aside this conveyance, Lord King dismissed it; saying it was a very reasonable thing for a widow, while it was in her power, to make a provsion for her children by her former husband. And this being before her treaty of marriage with the plaintiff, it had been impossible to have asked him to be a party thereto; he not being then thought of.

40. The Countess of Strathmore, a widow, having five children, and being tenant for life of a very considerable real estate, on the 10th Jan. 1777 executed a deed, whereby she conveyed all the estates whereof she was seised for life to two trustees, upon trust for her sole and separate use, exclusive of any husband she should thereafter marry, with a power of revocation. This settlement was in fact made in contemplation of Lady S.'s marriage with a Mr. Grey; and was with his knowledge and consent. But on the 17th of the same January she married Mr. Stoney, who afterwards took the name of Bowes. In the following month of May, Lady S., by the terror of personal violence, was compelled by her husband to execute a deed of revocation of the conveyance made before her marriage. In the year 1785, Lady S. quitted Mr. Bowes her husband, and ever after lived separate and apart from him; and exhibited her bill against him, to have the conveyance made before her marriage established; and to set aside the deed of revocation. An issue was directed to try whether the deed of revocation was obtained by duress, and the jury found that it was.

Strathmore v. Bowes, 2 Bro. R. 345. 1 Ves. Jun. 22. 6 Bro. Parl. Ca. 427. 2 Cox. R. 28

The cause then came on before Mr. Justice Buller, sitting for the Chancellor, who decreed that Lady S.'s conveyance before marriage should be established; and upon a rehearing before Lord Thurlow, this decree was affirmed.

On an appeal to the House of Lords, it was argued on behalf of Mr. Bowes.—1° That the conveyance was a fraud upon the contract of marriage, being made without the knowledge of the appellant, and concealed from him at the time of such marriage.

2°. That although such conveyance was suggested to have been made in contemplation of a marriage, intended between Lady S. and another person, yet such marriage did not take effect. And although the disposition made by that conveyance might not be fraudulent as against a person knowing of, and consenting to such disposition; yet as it would be clearly fraudulent against creditors, or purchasers for a valuable consideration, there was no sound reason why the same should not be deemed fraudulent as against the appellant; who by the marriage gave to Lady S. a legal title to dower in his own estate, worth at that time, as he asserted, about 1,000*l.* a year; and became responsible for all the obligations of a husband, and particularly for debts contracted, or to be contracted by her.

3°. That all the cases which had been determined by courts of equity upon the subject, agreed in regarding such a disposition, as fraudulent and void; especially where made merely and only for the immediate and separate benefit of the person making it.

4°. That if the decrees complained of should be established, a precedent would exist, destructive

of confidence in every matrimonial engagement; and leading to consequences subversive of all the grounds on which the law of this country, with respect to the obligations on husbands, by force of the contract of marriage, is founded.

On the other side the respondent submitted the following reasons for the affirmance of the decrees.

1°. That by the law of this country a woman, while unmarried, may dispose of and convey her property in any manner she pleases; and a husbsnd whom she afterwards marries, without any settlement made by him, or any enquiry concerning her fortune, has no right to impeach any conveyance which she has made of her property, for her own separate use.

2°. That there was no instance in which conveyances made by a woman of her property, before marriage, had been deemed void, because they had not been disclosed to her husband; unless attended with such circumstances, as proved such conveyances to be fraudulent; and that such conveyances were, in the case of a second marriage, where there were children by a former one, reasonable and laudable; and often favoured in a court of equity.

3°. That it was impossible to look at the circumstances of this case, without perceiving that such a conveyance as the appellant attempted to impeach, might be extremely reasonable. That if it were possible to conceive the husband of all others, who ought the least to be permitted to question any such dispositions made by a wife, the appellant was that husband. That every step by which he acquired his supposed marital rights, was grossly fraudulent: and therefore it would be an extraordinary administration of equity, to give him the property of his wife, which the law had secured to her, as a reward

of his fraud. That his attempt to invalidate the deed in question, must appear still more extraordinary; it having been determined that he, by the terrors of personal violence, had extorted from the respondent another deed, for the purpose of defeating this, which by the appeal he contended was in itself void. The decree was affirmed. *

41. This doctrine applies as well to a deed made by a man, as to one made by a woman. Thus where a father got his son to execute a deed secretly, on the morning of his marriage, charging the estate which was settled. It was set aside by the Court of Chancery, as being in fraud of the marriage agreement.

42. Lord Ch. B. Gilbert has said, that if a husband, seised in fee, should immediately before his marriage vest the legal estate in trustees, to disappoint his intended wife of dower; such a conveyance would be reckoned fraudulent; because it was made with an ill conscience, in order to deprive his wife of the provision made for her by the common law.

43. It was decreed by Sir W. Grant, that where a father made a settlement upon the marriage of his son, and the son gave the father a bond, to indemnify him from the payment of the jointure, the bond was void, as a fraud upon the contract.

44. Where the consideration of a deed is contrary to the rules of morality, the deed is void, both at law and in equity; and therefore a bond given to a woman, as the price of prostitution, is void at law.

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* This case is not reconcileable with the preceding ones. The determination was clearly founded on the very improper conduct of Mr. Bowes, before and after his marriage.

45. Upon oyer being prayed of a bond, it appeared to be from W. Perkins to the plaintiff Sarah Winter, in a penalty, reciting that Perkins and the plaintiff had agreed to live together; therefore he had contracted to find her meat, drink, &c. and to leave her an annuity of 60*l.* a year, if he quitted her, or she outlived him; and if they had any child, he was to provide for it; but if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity. The defendant pleaded, that this was an agreement between the plaintiff and his intestate to live together in a state of fornication; and that such a bond, made upon such an agreement, was void in law. In reply to this plea, the plaintiff alleged that she was a virgin, and was seduced by the intestate; and in consideration thereof this bond was given to her; and that it was *præmium pudicitiæ*. The defendant demurred.

Walker v. Perkins, 3 Burr. 1568. 1 Black. R. 517.

Lord Mansfield said, it was the price of prostitution; for if she became virtuous, she was to lose the annuity. The bond was therefore illegal and void.

46. In a case of seduction, where a bond is given for securing an annuity, or a sum of money for the support and maintenance of the person seduced, and not with any view to a future cohabitation, equity will not relieve.

Gray v. Mathias, 5 Ves. 286.

47. The Marquis of Annandale seduced a young woman named Harris, by whom he had a child: afterwards, by deed poll, he agreed that 2,000*l.* should be laid out in an annuity for her benefit and that of the child. The widow of the Marquis brought her bill to be relieved against this deed, as made upon an unlawful and wicked consideration; and Ann Harris brought her cross bill to be paid the 2000*l.* out of the assets of the Marquis. It was urged on behalf of

Annandale v. Harris, 2 P. Wms. 432. Cray v. Rooke, Forrest, 153.

Ann Harris, that the known diversity was, where the woman had before been a common prostitute, and drew in a young man to give such bond or covenant; in such case equity would relieve. But where the man seduced a woman, who was before modest, and gave such bond or covenant, there the obligor, who had done the injury, stated and ascertained himself the damages which were to be the *præmium pudicitiæ*, and no relief was given in equity.

On the other side it was objected, that supposing equity would not relieve against such bond or covenant; yet it being a matter of turpitude, equity ought not to intermeddle. The consequence of which would be, that both bills should be dismissed; and that the Court should not lend any assistance, on account of assets, or otherwise, in such a case.

Lord King said, if a man does mislead an innocent woman, it is both reason and justice he should make her a reparation; and decreed that the debt should be paid out of the assets, which was affirmed by the House of Lords.

1 Bro. Parl. Ca. 354

48. Although there be no seduction, yet if a man gives a bond to a woman, on account of a former cohabitation, an action at law may be maintained upon it.

Hunt v. Vaughan, 2 Wils. R. 354

49. In an action of debt upon a bond, the defendant prayed oyer of the condition, which was in these words:—"Now the condition of this obligation is such, that in consideration of cohabitation had by the above-bounden T. V. with the said Catherine, he the said T. V. hath hereby agreed to secure to the said Catherine the yearly sum of 30*l.* &c." The Court held that the bond was good.

50. Though the woman to whom such a bond is given was a common prostitute, yet it will not be set aside in equity.

51. A person who had maintained and kept a common prostitute for two years, gave her a bond, conditioned to pay her an annuity of 50*l.* a year. Upon the death of the obligor, his brother paid two quarters of the annuity, and then refusing to pay any more, filed a bill for an injunction, to prevent the defendant from proceeding at law, and to have the bond delivered up. Lord Camden said, he was clear that the plaintiff was not entitled to relief. The cases which had been determined against securities given to common prostitutes, went upon the circumstance of their being given previous to the cohabitation; a consideration which being *turpis* in its nature, the Court had relieved. In this case the bond was not given for a consideration, but was voluntary. The obligor had resort to her for near two years, before he gave her the bond. Past service could not be a consideration at law, and nothing was stipulated for the future. There was no principle in equity which said, a man might not give a voluntary bond to a common prostitute. It would be going but a little farther to say, he could not give her money, without her being liable to be called upon for it. There was no circumstance of fraud in the case; and he did not think, that where a voluntary bond was given, the obligee being a common prostitute, was of itself a sufficient ground for relief. The bill was dismissed. Hill v. Spencer, Amb. 641.

52. Lord Hardwicke has laid down a very proper distinction, in cases of this kind, between a married man and a bachelor; and has determined that where a married man gives a bond to a woman whom he has seduced, she knowing him to be married, as a *præmium pudicitiæ*, it shall not be supported in equity.

Priest v. Parrot, 2 Ves. 160.

53. A bill was brought for payment of 100*l.* and an annuity of 40*l.*, which was granted by the defendant to the plaintiff, who being a young woman, came to live in the family of the defendant, then a married man, as a companion to his sister. And afterwards occasioned a separation between him and his wife.

Lord Hardwicke said, the case was in some parts new, nor did he remember it had directly come before the Court. The consideration of the grant was plain; for though expressed to be for divers causes and considerations, it was plain, on the evidence, to what it was applied, nor was it disputed. It was plain also to him what this unhappy woman (who had been very criminal also) had submitted to, was from the seduction of the defendant: for her youth, when she came into the family, and good character before, were evidence thereof. And that certainly had been the principal ground of the determinations in that Court, where it had been considered as *præmium pudicitiæ*, when the young woman submitted to the suggestions of the man, and was guilty of no fault before. But he knew of no case where the Court had given countenance to these sort of bonds in case of a married man, she knowing it: that differed the case, because persons who submitted to a temptation of that sort, were without excuse: they knew absolutely they were doing a wrong which could not be healed, and which occasioned mischiefs to families. That differed it from the cases wherein the Court had gone some lengths, to make a provision for such unfortunate people. The bill was dismissed.

All Deeds are void as to Crown Debts. Tit. 1. § 75.

54. It has been stated, that where lands are once liable to a Crown debt, the lien continues, into whose hands soever they pass; even though conveyed by the debtor to a *bonâ fide* purchaser for a valuable

consideration. And therefore such conveyances are void as against the King, though good, as against all other persons.

55. Thus it is said in Roll's Ab. that if a man becomes debtor to the King, being seised of land in fee, and after aliens the land, yet it may be put in execution, though the alienation was before any action commenced. For it relates to the time when he became indebted to the King, and after. Tit. Prerog. B. pl. 1.

56. Thomas Favell, a collector of the fifteenth and tenth, being seised of certain lands in fee, *die intromissionis de collectione*, in extremity of illness, aliened his estate, and died without heir or executor. It was held that process should issue against the terretenants to answer and satisfy the King thereof. Favell's Case, Dyer, 160 a. 12 Rep. 3.

57. Sir William Cavendish, who was treasurer of the chamber to King Herny VIII., Edward VI., and Queen Mary, being indebted to the Crown, purchased lands, which he afterwards aliened; and of part took an estate to himself and his wife, and part remained in the hands of others; and died without rendering an account. It was debated whether or no these lands could be seised into the hands of the Queen, and be retained by the course of the common law, till an account was made by Cavendish: for he was not bound to the Crown in any recognizance or obligation, but the matter of the seisure rested entirely upon the common law. Seintloo's Case, Dyer, 224 *b*, Plowd. 321,

All the Barons of the Exchequer agreed that the seisure was lawful; for the Crown might have seised the lands in the hands of Cavendish; and by the same reason, in the hands of every one that came in under him; for *nullum tempus occurrit regi*. And Plowden says, Sir W. Seintloo, who had married Cavendish's widow, having intelligence that the law was against him and his wife, compounded with the

Queen by paying 1,000*l.* into the Exchequer; and got a release and pardon for the residue: and in the pardon it was recited, for the maintenance of the prerogative, that the law was with the Queen.

58. Where a person is an accountant to the Crown, and sells his lands, not being indebted to the Crown at the time of the sale, yet if he afterwards becomes indebted to the Crown, in his situation of accountant, his lands may be seised by the Crown, in consequence of the stat. 13 Eliz. in the hands of the purchaser.

Tit. 1. § 74.

Coke's Case, Godb. 289.

59. Sir C. Hatton being remembrancer, and collector of the first fruits, for his life, after the death or surrender of one Godfrey, who then held that office in possession; and being seised in fee of divers manors, settled them to the use of himself for life, remainder to his son in tail. He afterwards became indebted to the Crown by reason of his office; and the question was, whether the lands thus settled could be extended for the debt. It was resolved that although Sir C. Hatton was not indebted to the Crown at the time when he made the settlement, yet having become indebted to the Crown ten years after, the lands comprized in the settlement were liable, by reason of the retrospect of the words in the stat. 13 Eliz. "as if the same treasurer, receiver, &c. had, the day he first became accountant, stood bound by writing obligatory, having the effect of a statute staple to her Majesty, her heirs or successors, for payment of the same."

10 Rep. 55 *b.*

Coxhead's Case, Moo. 126.

60. An alienation *bonâ fide*, prior to the acceptance of an office, which renders the person accepting an accountant to the Crown, is good. And it was said *arguendo* in a subsequent case, that if a man is a receiver to the King, and not indebted, but clear, and sells his land, and ceases to be a receiver; and

Att. Gen. v. Alston, 2 Mod. 247.

afterwards is appointed to be a receiver again, and then a debt is contracted with the Crown, the former sale is good.

61. It has been stated that an assignment of a term for years, by a person indebted to the Crown, before any execution awarded, is good. But this doctrine does not apply to terms for years which are attendant on the inheritance; for in that case, if the King extends the inheritance, he will become entitled to the term.

The Crown entitled to a Term attendant. Tit. 8. c. 2. § 22. Nichols v. Howe, 2 Vern. 389.

62. Colonel Montresor being seised in fee of a freehold estate, and there being an old term for years in the lands outstanding, which was assigned to attend the inheritance, sold the estate, 1795, to Mr. Smith; and the term was assigned to a trustee for him. At the time of this sale Col. M. was indebted to the Crown, but Smith had no notice of that circumstance when he purchased. The Crown issued an extent against Col. M., and the sheriff seised the lands purchased by Smith. A question arose in the Exchequer, whether the outstanding term, which was held in trust for Smith, should protect him against the claim of the Crown.

Rex v. Smith, in Schach. An. 1804. Sugden Vend. 3d ed. 596.

The Lord Ch. Baron said, that the case that came nearest to this was that of the Att. General v. Sands, where it was resolved, that as the inheritance was not forfeited, the term was not forfeited; for being a term attendant, it was but an accessary to the inheritance. If the converse of this case was considered, it would make it still more clear; if the inheritance had been forfeited, the term must have been forfeited also. In deciding according to the course of the common law, he thought it clear that an outstanding term could not defeat the King's process by extent. In courts of equity, it was said,

Tit. 12. c. 2. § 28.

a purchaser without notice was a person favoured: perhaps it might be a sufficient answer to say, that in this case they were not in a court of equity. The question was, what ought to be the decision of a court according to the common law? This question could not be decided in a court of equity; they could not sue for a decree. When a court of equity was resorted to, and this was the situation of the parties, the Court did nothing but stand neuter between such parties; and leave them to make the most of it. He thought, on the whole, the land was chargeable that had been in the hands of the King's debtor: and from the cases that had been decided, it was sufficiently clear that the term was; it was the whole interest in the land, whether it was divided or not. Now that being so, it should seem to be the result of what was to be found in the Books, that of the King's common law remedy, it was impossible to doubt, and that remedy was given in every case where the party who was indebted to the Crown had a present beneficial interest, as well as a reversion; both of these were considered as chargeable for the debt of the Crown. The lands of the King's debtor might be extended by the Crown, in whatever hands they were found; and therefore, upon the whole, the judgment must be for the Crown.

Tit. 12. c. 13. § 34.

TITLE XXXII.

DEED.

CHAP. XXVII.

What Deeds are void as to Creditors and Purchasers.

1. *Statutes in favour of Creditors and Purchasers.*
3. *What Deeds are void by these Statutes.*
4. *Deeds made with an Intent to defraud Creditors.*
9. *Or to defraud Purchasers.*
12. *Notice is immaterial.*
15. *Voluntary Conveyances void against Creditors.*
18. *Except where the Grantor is not indebted at the Time.*
23. *Voluntary Conveyances void against Purchasers.*
28. *Though with Notice.*
31. *And Conveyances with Power of Revocation.*
39. *Who are deemed Purchasers.*
45. *Voluntary Conveyances binding on the Parties.*
48. *And good as to subsequent voluntary Deeds.*
51. *And also as to Wills.*
54. *Provisoes in favour of Deeds made on good Consideration.*
57. *Settlements before Marriage.*
67. *How far the Consideration of Marriage extends.*
72. *Settlement by a Widow on her Children.*

Section 1.

Statutes in favour of Creditors and Purchasers.

BY the statute 13 Eliz. c. 5. § 2. made perpetual by stat. 29 Eliz. c. 5. it is enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, and hereditaments, goods and chattels, or of any lease, rent, or other profit or charge out of the same, shall be deemed and taken, only as against person or persons, their heirs, executors, administrators, or assigns, whose actions by such covenous or fraudulent devices, shall be in any wise disturbed, hindered, or defrauded, to be void and of

none effect; any pretence, colour, feigned consideration, expressing of use, or other matter or thing, to the contrary.

2. By the stat. 27 Eliz. c. 4. § 2., made perpetual by the stat. 30 Eliz. c. 18,. it is enacted, "That all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of, in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity in or out of the same, shall be deemed and taken, only as against that person and persons, bodies politic or corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons, lawfully having or claiming by, from, or under them, which shall so purchase, for money or other good consideration, the same lands, tenements, or hereditaments, or any rent, profit, or commodity in or out of the same, to be utterly void, frustrate, and of none effect."

What Deeds are void by these Statutes.

3. With respect to the deeds which are rendered void by these statutes, as against creditors or purchasers, they are of two sorts: 1st, Deeds made with an express intent to defraud creditors, or subsequent purchasers. 2d, Deeds made upon good, but not valuable considerations, which are usually called voluntary conveyances.

ante, c. 2. § 53.

Deeds made with an Intent to defraud Creditors.

4. As to deeds made with an express intent to defraud creditors, no doubt can arise respecting their nullity under the statute 13 Eliz. whenever such an intent can be proved; even though they should be made for a valuable consideration.

5. In a case determined in 44 Eliz. the following circumstances were held to be badges of fraud:—1°. The gift was general, of all the donor's goods and chattels, real and personal, without exception of his apparel. 2°. The donor continued in possession, and used them as his own; and, by reason thereof, he traded and trafficked with others, and defrauded and deceived them. 3°. There was a trust between the parties. Twine's Case, 3 Rep. 80. Stone v. Grubham, 1 Roll. Rep. 3.

6. A. conveyed his estate to the use of himself for life, with power to mortgage such part as he should think fit, remainder to trustees, to sell and pay all his debts; but continued in possession, and kept the deed: afterwards A. became indebted by judgment and bond. It was decreed that this conveyance was fraudulent, as against the creditors by bond and judgment; who, not having notice of the settlement, should not come in on an average only with the other creditors. Turback v. Marbury, 2 Vern. 510.

7. It was determined in a modern case, that where a person, having several creditors, conveyed part of his real and personal estate to a trustee, in trust to pay half the rents and profits to the grantor, for his own use, and the residue among certain creditors named in a schedule; without any intention of fraudulently delaying his other creditors; the deed was not void, within the stat. 13 Eliz.: and Lord Kenyon said it was neither illegal nor immoral to prefer one set of creditors to another. Estwick v. Cailland, 5 Term R 420.

8. No creditor can avoid a fraudulent conveyance, unless his debt is of such a nature as to affect the land: so that he must obtain a judgment for it. 1 Ves. Jun. 160.

9. With respect to deeds made with an express intent to defraud purchasers, the stat. 27 Eliz. was particularly necessary; for it is said by Yelverton in 37 Eliz. that at common law, no fraud was remedied Or to defraud Purchasers. Cro. Eliz. 445.

which should defeat an after-purchase, but that only which was committed to defraud a former interest.

Colville v. Parker, Cro. Ja. 158.

10. The mere continuance in possession, after the execution of the conveyance, if such possession be consistent with the deed, is not in itself sufficient evidence of an intent to defraud.

11. It is not necessary that the person who sells the land should have made the former conveyance.

Burrell's Case, 6 Rep. 72.

For it was resolved in 8 Jac. that if a father made a lease by fraud or covin to defraud purchasers, and died; and the son, knowing or not knowing of the lease, sold the land for valuable consideration, the purchaser should avoid the lease.

Notice is immaterial.

12. Although the subsequent purchaser should have notice of the preceding fraudulent conveyance, yet he will be allowed to invalidate it.

Gooch's Case, 5 Rep. 60.

13. Thus, Lord Ch. J. Wray has said, if A. seised of land in fee, makes a fraudulent conveyance, to the intent to deceive purchasers, against the stat. 27 Eliz., and continues in possession, and is reputed owner; B. enters into discourse with A. for the purchase of it, and by accident gets notice of the fraudulent conveyance, and notwithstanding concludes with A., and takes assurance of him. In this case B. should avoid the fraudulent conveyance by the said act, notwitstanding his notice: for the act, by express words, made the fraudulent conveyance void, as to a purchaser: and forasmuch as it was within the express purview of the act, it ought to be taken and expounded in suppression of fraud.

Cowp. R. 711.

Standen v. Bullock, 5 Rep. 60.

14. One Bullock made a fraudulent estate of his land within the stat. 27 Eliz., and afterwards offered to sell it to Standen. Before assurance thereof, Standen had notice of the fraudulent conveyance, and notwithstanding proceeded and took his assu-

rance of Bullock. It was agreed that Standen should avoid the fraudulent conveyance; for the notice of the purchaser could not make that good, which an act of parliament made void as to him; and true it was, *quod non decipitur qui scit se decipi.* But in this case the purchaser was not deceived; for the fraudulent conveyance, whereof he had notice, was void, as to him, by the said act, and therefore should not hurt him; nor was he, as to that, in any manner deceived.

Voluntary Conveyances void against Creditors.

15. When the Judges were first called upon to expound these statutes, they appear to have considered all voluntary conveyances, that is, all conveyances not founded on a pecuniary or other valuable consideration as fraudulent, and consequently void against actual or future creditors.

Apharry v. Bodingham, Cro. Eliz. 350.

16. Thus where A. having lands as heir to his father, covenanted for natural love and affection to stand seised to the use of himself for life, remainder to his first son in tail, &c.; he having notice at the time of a bond entered into by his father to B.; an action of debt was brought by B. on this bond against A. as heir; and it was held that the conveyance by A. was fraudulent and void against B., as much as a conveyance by the father, the original debtor, would have been.

Stiles v. Att. Gen. 2 Atk. 152. 1 Ves. & Bea. 112.

17. Lord Hardwicke has said, that he had scarcely known one case, where the person conveying was indebted at the time of the conveyance, that had not been deemed fraudulent.

1 Atk. 15.

Except where the Grantor is not indebted at the time.

18. It appears however to have been soon established, that voluntary conveyances were only void against creditors, where the persons making such conveyances were indebted at the time; and that all voluntary conveyances were not void against future creditors; but only such as were also fraudulent.

2 Vern. 327.

Holcroft's Case, Dyer, 294 *b.*

19. Thus it is said in a note in Dyer, that if a man conveys land, for the preferment of his children, this shall be good, if he was not in debt at the time: but if he was in debt, it would be otherwise.

1 Atk. 93. 4.

20. Lord Hardwicke has said, that it is necessary, on the stat. 13 Eliz., to prove that the person making a settlement was indebted at the time, or immediately after the execution of the deed. And that where a man has died indebted, who in his lifetime made a voluntary settlement, upon application to the Court of Chancery, to make it subject to his debts as real assets, the Court has always denied it, unless it was shown that he was indebted at the time the conveyance was executed.

2 Ves. 10. S. P.

Stephen v. Olive, 2 Bro. R. 9.

21. It was held by Lord Kenyon, when M. R. that a settlement after marriage, in favour of a wife and children, by a person not indebted at the time, was good against creditors, and not within the stat. 13 Eliz. And in another case it was declared by Lord Alvanley, when M. R., that to impeach a settlement, made after marriage, under the stat. 13 Eliz., the husband must be proved to have been indebted at the time, to the extent of insolvency.

Lush v. Wilkinson, 5 Ves. 384.

12 Ves. 147.

Walker v. Burrowes, 1 Atk. 93.

22. Conveyances of this kind are however rendered void against commissioners of bankrupts, by the statute 1 Ja. I.; unless made upon the marriage of a child, being of the age of consent.

Voluntary Conveyances void against Purchasers.

23. Voluntary conveyances are in all cases void against subsequent *bonâ fide* purchasers, for valuable consideration; for the subsequent conveyance to a purchaser sufficiently proves a fraudulent intent in making the former conveyance. And although it is said in Bovey's case, that a voluntary conveyance was not upon that account to be reckoned fraudulent, or to be avoided by a purchaser for a valuable consi-

1 Vent. 194. 2 Ves. 10. 3 Atk. 412.

deration; and this doctrine has been frequently repeated; yet there is no case in which a voluntary conveyance, though unattended with fraud, has been supported against a subsequent *bonâ fide* purchaser, for a valuable consideration; but, on the contrary, such voluntary conveyances have always been deemed fraudulent and void, as against subsequent purchasers. Tot. 158. Moo. 615.

24. The plaintiff's suit was to be relieved upon articles of agreement for the purchase of land from the defendant Richard Dean, who, before any conveyance in execution of the articles, had conveyed the premises by deed to the defendant, Roger Dean his son. The Court, with the assistance of the Judges, declared that the said deed so made to Roger Dean, being a voluntary conveyance, and the said Richard Dean settling the premises to the plaintiff for valuable consideration, the said voluntary conveyance was a fraud. Leach v. Dean, 1 Cha. R. 78.

25. Settlements made on a wife or children after marriage, unsupported by any other consideration but that of love and affection, being only founded on a moral duty, are voluntary; and void under the stat. 27 Eliz. as to subsequent purchasers for valuable consideration.

26. Thus, in the case of Colvill v. Parker, Just. Tanfield cited a case in which it was adjudged, that where a person, after marriage, voluntarily assigned a lease for years, as a jointure for his wife; and afterwards sold it to one who had not any notice of this conveyance; it was within the statute. Woodie's Case, Cro. Ja. 158.

27. J. Reade being tenant for life, with remainder to his daughter Elizabeth in tail; they joined in levying a fine to trustees, in trust for the father for life, and after his decease for the maintenance of Elizabeth and her children during the life of Eliza- Goodright v. Moses, 2 Black. R. 1019.

beth, and after her death and that of her husband, to raise portions for their younger children. Elizabeth survived her husband, and made a lease of the premises for 21 years at a rack rent. Upon an attempt to annul this lease by the daughter of Elizabeth, Lord C. J. De Grey delivered the opinion of the Court, that the deed was only a voluntary conveyance, within the true meaning of the stat. 27 Eliz., being founded only upon a good, and not upon a valuable consideration: and therefore could not be set up against a *bonâ fide* purchaser.

Though with Notice.

Chapman v. Emery, infra.

28. Although a purchaser has notice of a voluntary settlement, before he purchases, yet it will not affect him; and he will be allowed to hold the estate against the persons claiming under such voluntary settlement.

Evelyn v. Templar, 2 Bro. R. 148.

29. C. Evelyn, by a settlement after marriage, conveyed the premises in question to trustees, to the use of himself for life, remainder to trustees, to pay an annuity to his wife for her life, remainder to other trustees, to raise 4,000*l.* for younger children, remainder to his first and other sons in tail, with a proviso that it should be lawful for C. Evelyn, by deed, to revoke the uses, and sell the estate; but he covenanted that the money to be raised by the sale of the lands, should be paid to the trustees, to be by them laid out in the purchase of other lands, to be settled to the same uses. J. Templar purchased the settled estate of Evelyn, and paid the purchase money to him. The children of Evelyn, claiming under the settlement, filed their bill against Templar, stating that he had notice of the settlement, and insisting that he ought to have paid the purchase money to the trustees, not to Evelyn. The defendant contended, that the settlement being made after marriage, was

voluntary and fraudulent as to him; and claimed the benefit of the statute 27 Eliz. Lord Thurlow said, that although it would have been as well, at first, if voluntary conveyances had not been thought so little of, yet the rule was such, and so many estates stood upon it, that it could not be shaken; and dismissed the bill.

30. J. Manning, by indenture dated in 1783, in consideration of love and affection for his mother, sisters, and brother, and for making a provision for them, conveyed the premises in question to trustees, to the use of himself for life, remainder to the use of his mother for life, &c. Two years after, J. Manning, in consideration of 1,800 *l.* conveyed the premises to R. Otley in fee, and Otley had notice of the settlement of 1783 before payment of the purchase money, and execution of the conveyance. Doe v. Manning, 9 East, 59.

The question was, whether this conveyance to Otley, who brought an ejectment for the recovery of the premises, was good, against the prior settlement.

Lord Ellenborough delivered the judgement of the court. He said, as it was found that there was no fraud in fact in the conveyance of 1783, the only point for the consideration of the Court was, whether a voluntary conveyance, without any valuable consideration, be not, according to the legal construction of the statute 27 Eliz. fraudulent against a subsequent purchaser for a valuable consideration; or, in other words, whether in such case the law do not presume fraud, without admitting such presumption to be contradicted. After stating all the cases, his Lordship concluded in these words: "Thus stand the authorities on both sides of the question; and the weight, number, and uniformity of those which establish the point contended for, on behalf of the plaintiff, do,

in our opinion, very much preponderate. And as many estates depend upon the rule, it ought not, we conceive, to be shaken. It appears from a manuscript note, formerly belonging to Mr. Justice Clive, that Mr. Horseman, in the year 1713, advised the making of a mortgage of the estate setfled in strict settlement by Sir R. Anderson, after his marriage; thinking it voluntary and fraudulent, as against a purchaser. And the like advice as that which he gave nearly a century ago, probably had been given before; and that it has been given since, and acted upon, we cannot doubt; as Lord Thurlow was not likely to have expressed himself as he did in Evelyn v. Templar, unless he had known that such had frequently been the case. Feeling ourselves pressed with these authorities and considerations, we think ourselves bound to give judgement for the plaintiff.

ante, § 29.

Much property has no doubt been purchased, and many conveyances settled, upon the ground of its having been so repeatedly held that a voluntary conveyance is fraudulent, as such, within the stat. 27 Eliz.; and it is no new thing for the Court to hold itself concluded, in matters respecting real property, by former decisions, upon questions in respect to which, if it were *res integra*, they probably would have come to very different conclusions. And if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the legislature; which is able to prevent the mischief in future, and to obviate all the inconvenient consequences which are likely to result from it, as to purchases already made. And we cannot but say, as at present advised, and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only

against purchasers for a valuable consideration, without notice of the prior conveyance. Vide Buckle v. Mitchell, 18 Ves. 100.

31. By the fifth section of the stat. 27 Eliz. it is enacted, that if any person shall make any conveyance of any lands, with a clause of revocation, at his will and pleasure, of such conveyance, and after such conveyance, shall bargain, sell, demise, grant, convey, or charge the same lands to any person or persons for money, or other good consideration, the said first conveyance not being revoked, that the said former conveyance, as against such bargainees, vendees, lessees, their heirs, successors, executors, administrators, and assigns, shall be void and of none effect. And Conveyances with Power of Revocation.

32. It was resolved in Twine's case, that if a man has a power of revocation, and afterwards, to the intent to defraud a purchaser, levies a fine, or makes a feoffment, by which he extinguishes his power, and then bargains and sells the land for a valuable consideration, the bargainee shall enjoy it; for as to him, the fine or feoffment by which the condition was extinct, was void by the said act; and so the first clause, by which all fraudulent and covinous conveyances are made void, as to purchasers, extends to the last clause of the act, namely, when he who makes the bargain and sale had power of revocation. And it was said that the stat. 27 Eliz. has made voluntary estates, with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin, to defraud purchasers. 3 Rep. 83 *a*. Cross v. Faustenditch, Cro. Ja. 180.

33. A man conveyed lands to the use of himself for life, remainder to several persons of his blood, with a future power of revocation; and before the power began, he, for a valuable consideration, bargained and sold the land to another and his heirs. It was adjudged that this bargain and sale was within the Standen v. Bullock, 3 Rep. 83 *b*.

remedy of the statute; of which the intent was, that all voluntary conveyances, which were originally subject to a power of revocation, whether present or future, should not stand against a purchaser for a valuable consideration.

Tarback v. Marbury, 2 Vern. 511.

34. A power to mortgage an estate to any extent is in effect a power of revocation, and will therefore render a deed void, as to a subsequent purchaser. But if no fraud be found, a proviso to charge with a particular sum is not within the statute.

Jenkins v. Keymish, 1 Lev. 152.

Lavender v. Blackstone, 2 Lev. 146.

35. A power to lease all or any part of the lands, for any number of years, with or without any rent, being in effect a power of defeating the whole settlement, has been considered as a power of revocation.

36. Where the power of revocation can only be exercised with the consent of persons who are not under the control of the settlor, the conveyance will not be considered as within the statute.

Buller v. Waterhouse, 2 Show. 46. 2 Jones, 94.

37. Sir John and Lady Maynard, in consideration of the marriage of their son, and of 5,000*l.* portion paid with his wife, covenanted to levy a fine of lands, which were the estate of Lady Maynard, to the use of Sir John for life, remainder to Lady M. for life, remainder to the son and his heirs; with a proviso, that it should be lawful for Sir John and Lady M., with the consent of four persons, to revoke the uses. After the death of Sir J., Lady M. entered and sold some of the lands, without the consent of the trustees. It was resolved that the settlement was not fraudulent, within the stat. 27 Eliz., as it could not be made to deceive a purchaser. The power of revocation not being exercisable at the will and pleasure, such are the words of the act, of the settlor; but was restrained by the necessity of obtaining the consent of four persons,

intrusted for the son's wife. Whereas in the case mentioned in 3 Rep. 83 b. the consent seemed to be given by a person at the devotion of the settlor, and appointed by him.

38. Where a deed contains a power of revocation, at the will and pleasure of the settlor, it is immaterial whether the consideration be a valuable, or only a good one; for it is equally void as to a subsequent purchaser. And in an opinion of Mr. Booth's it is said, "The reserving of powers of revocation to the grantors or original owners of the land, though checked by requiring the consent of the trustees, hath of late been disused in settlements; because doubts have arisen whether such settlements are not fraudulent within the statute of 27 Eliz." And now powers of revocation, sale, and exchange, are always reserved to the trustees.

Collect. Jur. vol. 1. 426.

39. With respect to the persons who are deemed subsequent purchasers within the stat. 27 Eliz., it was resolved in Twine's case, that no purchaser should avoid a precedent conveyance, made by fraud and covin, but he who was a purchaser for money, or other valuable consideration. For although in the preamble it is said, for money or other good consideration, and likewise in the body of the act, yet these words are to be intended only of valuable consideration. And this appeared by the clause respecting powers of revocation; for there it is said, for money or other good consideration, paid or given; where the word paid is referred to money, and given to good consideration; which excludes all considerations of nature, or blood, or the like, and were to be intended only of valuable considerations, which might be given.

Who are deemed Purchasers. 3 Rep. 83 a.

40. A mortgagee is a purchaser within the stat. 27 Eliz., and may therefore avoid a prior fraudulent conveyance.

Chapman v. Emery, Cowp. 279.

41. R. Emery conveyed the premises in question, without any consideration, to the use of himself for life, remainder to his wife for life, remainder to their issue in tail. Three years after, Emery mortgaged the premises for 700 *l.* to a person who had notice of the settlement. In an ejectment, the question was, whether the mortgagee should avoid the settlement as fraudulent, under the stat. 27 Eliz. It was contended, 1°. That the statute only related to purchasers, and that a mortgagee was not a purchaser. 2°. That the mortgagee had notice; and no pretence or circumstance of fraud appeared. The settlement was three years prior to the mortgage, therefore could not have been made with a view to defeat it.

Lord Mansfield said, there was no doubt but that a mortgagee was a purchaser. And as to the point of notice, that made no difference; because it was of a conveyance made void by the statute.

ante, § 27. Cro. Eliz.

42. A lessee at a rack rent is a purchaser within the stat. 27 Eliz.; and in the case of Goodright v. Moses this point was admitted. But in the case of Upton v. Bassett it was held, that where a person made a lease without receiving any fine, or reserving any rent, the lessee was not a purchaser within the stat. 27 Eliz. and therefore could not avoid a preceding voluntary conveyance.

Twine's Case, 3 Rep. 83 *b*: Doe v. Routledge, Cowp. 705.

43. Where the price is inadequate in a considerable degree, or where an apparent inadequacy of price is coupled with other circumstances, indicating a fraudulent collusion between the purchaser and the vendor, to avoid a preceding conveyance; a purchaser under such circumstances will not be entitled to the protection of the statute.

Douglas v. Waad, 1 Cha. Ca. 99.

44. The consideration of marriage is sufficient to establish a subsequent conveyance, and to render a previous one fraudulent and void, as against such

second conveyance. But a settlement upon a wife after marriage, or upon children, will not avoid a preceding conveyance, unless it is made in pursuance of articles entered into before marriage.

Martin v. Seamore. 1 Cha. Ca. 170. 1 Ab. Eq. 353. Cro. Eliz. 445.

45. The statutes 13 & 27 Eliz. only avoid voluntary conveyances, as against creditors and subsequent purchasers; and therefore the persons making voluntary or fraudulent and covinous conveyances, and all those claiming under them, are as much bound by such conveyances, as if these statutes had not been made.

Voluntary Conveyance binding on the Parties.

46. A. made a voluntary conveyance to B., and afterwards a mortgage of the same lands; the first deed, on a trial at law, was found fraudulent; B. exhibited his bill to redeem the mortgage. It was decreed, that though the deed to B. was fraudulent, *quoad* the mortgage, yet it was good as to the equity of redemption, and would pass it; for a voluntary deed is good against the party that makes it, and his heirs.

Rand v. Cartwright, Nels. 101.

47. In the case of Leach v. Dean the Court declared, that as to the voluntary conveyance, the same was not thereby impeached, as between the father and son, for any advancement, or any other thing thereby settled on the said son; other than making the said articles.

ante, § 24.

48. A voluntary deed cannot be defeated by a subsequent voluntary deed. And it has been stated, that where there are two voluntary conveyances of the same land, the first will prevail.

And good as to subsequent voluntary Deeds. ante, c. 2. § 49.

50. A. made a voluntary settlement of lands in trust for his grandson and his heirs; some years after, he made another voluntary settlement of the same estate, to the use of his eldest son for life, remainder to his first and other sons in tail; and by

Clavering v. Clavering, 2 Vern. 473. 1 Ab. Eq 24.

will gave a considerable estate to his grandson. It was proved that A. always kept the first settlement in his custody, and never published it, but it was found after his death amongst his waste papers; and the after deed was often mentioned by him, and he told the tenants that his eldest son was to be their landlord, after his death; yet the bill was dismissed, as to any relief against the first deed. The decree was affirmed in parliament.

And also as to Wills.

51. A voluntary settlement is also good against a subsequent will, because neither of them are founded on a valuable consideration.

Villers v. Beaumont, 1 Vern. 100.

52. A person who was *cestui que trust* of a term, by a little scrap of paper at an ale-house, but under hand and seal, settled the term on the plaintiffs, to pay his debts; and gave them the surplus. Afterwards, being dissatisfied with this settlement, which he had delivered to a creditor, he devised the term, by will in writing, to his half brother, subject to the payment of his debts. The question was, whether the deed or will should prevail.

Lord Nottingham held, that there was no colour for setting the deed aside, to make way for the will: that if a man improvidently binds himself up by a voluntary deed, and does not reserve a liberty to himself, by a power of revocation; the Court of Chancery will not loose the fetters he has put upon himself, but he must lie down under his own folly. For if you would relieve in such a case, you must consequently establish this proposition, viz. that a man can make no voluntary disposition of his estate, but only by his will; which would be absurd.

Boughton v. Boughton, 1 Atk. 625.

53. In a subsequent case Lord Hardwicke held, that a voluntary deed, kept by a person, and never cancelled, could not be set aside by a subsequent will.

54. There is a proviso in the stat. 18 Eliz. § 6. that the act shall not extend to any estate or interest in lands made upon good consideration, and *bonâ fide* lawfully conveyed or assured to any person, not having at the time of such conveyance any notice of such covin, fraud, or collusion. And in the stat. 27 Eliz. there is also a proviso, (§ 4.) that the act shall not extend to make void any conveyance, assignment of lease, assurance, grant, charge, lease, estate, or interest, in any lands, &c. made upon good consideration, *bonâ fide*, to any person or persons, bodies politic or corporate.

Proviso in favour of Deeds made on good Consideration.

55. In consequence of these provisoes, deeds made for a pecuniary consideration, or in consequence of any stipulations which are beneficial and valuable to the grantor, the word good in these provisoes meaning valuable, are not within these acts; and cannot therefore, be impeached, either by creditors, or subsequent purchasers.

56. John Hammerton being seised in fee of an estate charged with an annuity of 50 *l.* to his mother, and having two brothers, and being about to be married, prevailed on his mother to relinquish her security upon the whole estate, and take a security upon part: a settlement was made accordingly, by which the estate was limited to John for life, remainder to his first and other sons by that marriage in tail male, remainder to the next brother in tail male, remainder over. And the question was, whether the remainder to the next brother of John was voluntary. The Court held that it was not voluntary, because the mother must be presumed to have stipulated for the limitation to her second son, as the price of her relinquishing her security upon the whole estate, and taking a new security upon part.

Roe v. Mitton, 2 Wils. R. 356.

Settlements before Marriage.

Plowd. 58. Bovy's Case. 1 Vent. 193.

57. Marriage being considered as a valuable consideration, deeds made previous to, and in consideration of an intended marriage, have been always held good within these provisoes, and not impeachable by creditors, or subsequent purchasers.

Kirk v. Clark, Prec. in Cha. 275

58. A person having an estate in reversion in a copyhold, surrendered it to his eldest son in tail, in order that his son, coming in as a purchaser, should pay a smaller fine. Afterwards the father, on a treaty of marriage between his son and B., told B.'s friends that this copyhold was so settled; and the marriage was had, and a portion of 2,000*l.* paid with B. Some time after, the father settled the copyhold on a second wife.

Lord Cowper decreed that the surrender to the son was good; for though it was at first voluntary, yet upon the treaty of the marriage it was a principal inducement, therefore became valuable; and ought to be considered as if it had then been surrendered to the son.

1 Ab. Eq. 354.

59. Though a settlement be executed after marriage, yet if it be made in pursuance of an agreement entered into before marriage; or in consideration of an additional portion; it will be as good as if made before marriage.

Jones v. Marsh, Forrest, 63.

60. The defendant's father, some time after marriage, in consideration of an additional portion of 100 *l.* paid by his wife's mother, settled an estate of 100 *l.* a year on himself for life, remainder to his first and other sons, &c.; and the mother of the defendant's father, having an interest in the estate, joined with him in the conveyance. Thirteen years after, the father mortgaged the estate to the plaintiff, with the usual covenants, and died.

Lord Talbot said, the question was, whether this

was a voluntary conveyance or not. And it would be very hard to call this a fraudulent settlement, since it was in consideration of a marriage had, and of an additional portion paid by the wife's relations; which could not be called voluntary against a mortgage made thirteen years after.

61. R. Williams made a settlement, in consideration of a marriage already had, and of a portion of 1,000*l.* paid to him by his wife's brother: the husband became a bankrupt, and the question was, whether this settlement was good against his creditors. Brown v. Jones, 1 Atk. 188.

Lord Hardwicke said, it was admitted, if a settlement was made before marriage, though without a portion, it was good; for marriage itself was a consideration. And it was equally good, if made after marriage, provided it was upon payment of money, as a portion; or an additional sum of money, or even an agreement to pay money, if the money was afterwards paid, pursuant to the agreement. This was allowed both in law and equity to be sufficient to make it a good and valuable settlement. Decreed a good settlement against the creditors.

62. In a subsequent case Lord Hardwicke said, that a settlement, though made after marriage, yet being in consideration of a portion which, for any thing that appeared, was paid at the time, could not be impeached by subsequent creditors. Stileman v Ashdown, 2 Atk. 477. Ramsden v. Hilton, 2 Ves. 304.

63. Where a wife joins with her husband in destroying the settlement made on her marriage, and a new settlement is made, such new settlement will be good; though a better provision is made for the wife and children than was contained in the original settlement.

64. Sir R. Bell on his marriage settled certain lands on himself for life, remainder to his wife for Scott v. Bell, 2 Lev. 70.

her jointure, remainder to the first and other sons of the marriage, &c. Sir R. Bell having afterwards contracted debts, and there being no issue, his wife joined him in a fine of the settled estates, and they were sold. Sir R. B. covenanted to stand seised of other estates to the same uses as those contained in the settlement. It was resolved by Lord Hale and the other Judges, that the second settlement was good, and valid against subsequent creditors; for the old settlement being destroyed, and the new one made the same day, an agreement by the husband to make the new settlement, in consideration of the wife's having joined in the fine, to destroy the old settlement, would be presumed. And this consideration should extend to all the limitations in the new settlement; although the estates comprised in the new settlement were nearly double the value of those contained in the old one.

Stephens v. Olive, 2 Bro. R. 9.

65. Lord Kenyon, when M. R., held that where a husband, after marriage, conveyed an estate to trustees, for the separate use of his wife, the covenants by the trustees to indemnify the husband against the debts which the wife might contract after the separation, was a valuable consideration; and therefore that the settlement, though made after the debt due to the plaintiff was contracted, was good against him.

Cadogan v. Kennett, Cowp. 432.

66. It was held in a modern case that a settlement, made before marriage, in consideration of the marriage, and of a considerable marriage portion, by a person who was indebted at the time, was good against creditors.

How far the Consideration of Marriage extends.

67. In the case of settlements made before marriage, there has been a considerable difference of opinion respecting the extent to which the considera-

tion of marriage ought to be carried; it being settled that a deed may be fraudulent as to one person, and good as to another. In some cases it has been held, that the consideration of marriage extends, not only to the estates limited to the husband and wife and their issue, but also to the estates limited to any branch of the husband's family.

68. Thus where a person, in consideration of the marriage of his son, and of £2,000 marriage portion, settled the premises to the use of himself for life, remainder to his son and the heirs of his body by that marriage, remainder to the heirs of the body of his son by any other wife; it was contended that this last limitation, not being within the consideration of the marriage settlement, was voluntary, and therefore void against subsequent purchasers. But Lord Hale said, that the consideration of the marriage and marriage portion would run through all the estates raised by the settlement, though the marriage was not concerned in them, so as to make them good against purchasers, and to avoid a voluntary conveyance.

Jenkins v. Kemis, Hard. 395.

69. So where a person covenanted, in consideration of the marriage of his eldest son, and a marriage portion, to settle lands on him in tail, remainder to his second son; it was held that the consideration extended to the second son; and therefore that the settlement was not fraudulent against creditors.

White v. Stringer, 2 Lev. 105.

Osgood v. Stroud, 2 P. Wms. 245.

70. On the other hand there are several cases where the consideration of marriage has only been allowed to extend to the immediate objects of the settlement, and not to any remote ones. Thus it is said by Lord Macclesfield in 10 Mod. 534, that where there is a marriage portion and settlement, that part of the settlement only which belongs to the wife, and

Ball v. Burnford, Prec. in Cha. 113.

Staplehill v. Bully, Id. 224.

2 P. Wms. 249.

children by that wife, can be esteemed to be founded upon the consideration of that marriage; for it was absurd to imagine that the friends of the wife should be supposed at all concerned about the remote uses of the settlement, upon persons to whom they were entire strangers. And as for the case of Jenkins v. Kemis, it ought not to be understood in so absurd a sense as that came to: the meaning of the case was no more than this; that a father, where he makes a marriage settlement upon one son, has such a fair and justifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon and embrace it, by inserting in the settlement provisions for them, such provisions shall never be deemed fraudulent, and as such set aside in favour of creditors.

ante, § 68.

Reeves v. Reeves, 9 Mod. 132.

71. In another case Lord King has said, that where a settlement was made by the father, or other lineal ancestor, in consideration of the marriage of his son, in such case all the remainders limited to his children and their posterity were within the consideration of the settlement. But where it was made by a brother, or other collateral ancestor, on his marriage, there, after the limitations to his own issue, allthe remainders limited to his collateral kindred were voluntary, and not within the consideration of the marriage settlement.

Settlement by a Widow on her Children.

72. There is one case in which a conveyance, founded on a moral consideration only, has been held good against a subsequent purchaser; namely, that of a widow making a settlement on her children previous to her marrying a second husband.

Newstead v. Serles, 1 Atk. 265,

73. Thus where a widow, who had two children, by articles previous to her second marriage, with the

consent of her intended husband, settled her estate upon her two children. The husband and wife afterwards mortgaged the estate to a person who had notice of the settlement.

Lord Hardwicke said, the question was, whether the articles were for a valuable consideration, and binding; or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors, or purchasers. And if he was to lay it down as a rule that such articles were not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former; and the second husband might then contrive to defeat the provision made for those children. He therefore decreed, that the articles ought not to be considered as voluntary; for there were reciprocal considerations, both on the part of the husband and the wife; and the mortgagee had notice of the articles.

TITLE XXXII.

DEED.

CHAP. XXVIII.

Of registering and enrolling Deeds.

2. *Register Acts.*
12. *An Appointment must be registered.*
14. *Registering an Assignment is not a Register of the Lease.*
16. *Registering is not Notice.*
20. *Notice takes away the Effect of registering.*
25. *The Notice must be fully proved.*
28. *Utility of the Register Acts.*
30. *Register of Annuities.*
31. *Register of the Bedford Level.*
32. *Enrolment of Deeds.*

Section 1.

BY the common law, every deed took place according to the priority of its date or delivery; in consequence of which, purchasers and mortgagees were frequently defrauded by means of prior conveyances, with which they were unacquainted.

Register Acts.

2. To remedy this inconvenience, in certain parts of the kingdom, several acts of parliament have been made, called the Register Acts. The first of these is the statute 2 & 3 Ann. c. 4. by which it is enacted, "That a memorial of all deeds and conveyances which, after the 29th day of September 1704, shall be made and executed, of or concerning, and whereby any honours, manors, lands, tenements, or hereditaments in the west riding of the county of York, may be any way affected, in law or equity, may, at the election of the party or parties concerned,

be registered. And that every such deed or conveyance that shall at any time after the said day be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless such memorial thereof shall be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

3. By the 7th section it is enacted, "That all and every memorials so to be entered or registered, shall be put into writing in vellum, or parchment, and directed to the register of the said office; and in case of deeds and conveyances, shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of the deed or conveyance mentioned in such memorial."

4. By the 8th section, it is further enacted, "That every memorial of any deed or conveyance shall contain the day of the month and the year when such deed or conveyance bears date, and the names and additions of all the parties to such deed or conveyance, and of all the witnesses to such deed or conveyance, and the places of their abode, and shall express or mention the honours, manors, lands, tenements, and hereditaments contained in such deed or conveyance, and the names of all the parishes, townships, hamlets, precincts, or extra-parochial places, within the said west riding, wherein any such honours, &c. are lying or being, that are given, granted, conveyed, or any way affected or charged, by any such deed or conveyance, in such manner as the same are expressed or mentioned in such deed or

conveyance, or to the same effect. And that every such deed or conveyance, of which such memorial is so to be registered as aforesaid, shall be produced to the said register, or his deputy, at the time of entering such memorial, who shall indorse a certificate on every such deed or conveyance, and therein mention the certain day, hour, and time, on which such memorial is so entered and registered, expressing also in what book, page, and number the same is entered; and that the said register, or his deputy, shall sign the said certificate, when so indorsed.

5. By the 16th section it is provided, that this act shall not extend to any copyhold estates, or to any leases at a rack rent, or to any lease not exceeding twenty-one years, where the actual possession and occupation goeth along with the lease.

6. By the stat. 6 Ann. c. 35. similar regulations are made for registering all deeds and conveyances that may affect any honours, manors, &c. in the east riding of the county of York, or the town and county of the town of Kingston-upon-Hull, with the same exception of copyholds and leases; and by the 18th section of this statute, it is enacted, that every enrolment of a deed of bargain and sale in the said register office, shall be deemed and adjudged to be the entering a memorial thereof pursuant to this act, and shall have the same force and effect upon the estate therein mentioned, in relation to all subsequent deeds, as if a memorial of such enrolled deed had been entered in the said register office.

7. By the stat. 7 Ann. c. 20. similar regulations are made for registering all deeds and conveyances that may affect any honours, manors, &c. in the county of Middlesex, with a proviso, (§ 17.) that the act shall not extend to copyholds or leases at rack rent, or

leases not exceeding 21 years, where the possession goes with the lease, or to any chambers in Serjeant's Inn, the Inns of Court, or Inns of Chancery.

8. This statute does not extend to messuages, lands, or tenements in the City of London.

9. By the stat. 8 Geo. II. c. 6. similar regulations are made for registering all deeds and conveyances, that may affect any honours, manors, &c. in the north riding of the county of York; with the same exception, as to copyholds and leases, as in the former statutes*.

10. By the 22d section of this last statute, reciting that deeds had often been destroyed by fire and other accidents, it is enacted, that any person having or claiming title to any honours, &c. in the said north riding, may register at full length in the said register office, all deeds, writings, and conveyances under which such title shall be claimed, and that all copies of such entries and enrolments of such deeds, &c., signed by the register or his deputy, shall be good evidence of such deeds, &c. destroyed by fire or other accident; and by the 24th section it is enacted, that every such enrolment shall be deemed to be the entry of a memorial thereof pursuant to this act, and shall have the same force and effect in relation to all subsequent deeds.

11. The effect of these acts is merely to render a prior unregistered deed fraudulent and void, as to a subsequent deed, whereof a memorial has been duly registered; so that a purchaser or mortgagee can only be affected by a deed duly registered, of which he

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* Wills of land may be registered under these acts. Vide Tit. 38. c. 1.

may have notice by examining the register; and not by any other deed whatever.

An appointment must be registered.

12. The words of these acts being, all deeds and conveyances, extend to every species of deed or instrument, by which lands may be conveyed or affected; and therefore an appointment, under a power, is considered as a conveyance within the register acts: and if not registered, will be postponed to a subsequent mortgage duly registered.

Scrafton v. Quincy, 2 Ves. 413.

13. The plaintiff came into court under a mortgage deed dated in September 1749, to be paid 500*l.* advanced by him to Thomas Robertson, and interest; or to have the estate sold, and to be paid thereout. The objection thereto was, that Robertson had no power to convey to the plaintiff, because he had before properly appointed the premises for the benefit of others: for that, by deed and fine in 1742, this estate was settled to the use of him and his wife, and afterwards to such uses as he and she, or the survivor, should by deed or will appoint. This power was by a deed in 1744, executed by the husband and wife; and appointments were made therein for the benefit of the defendants, who therefore claimed prior to the plaintiff's mortgage in 1746. It was answered that the appointment of the uses of that deed and fine, could not be set up against the plaintiff, because the premises lay in Middlesex, where there was a register act; in consequence of which, this deed of 1744 would be void against the plaintiff, as not being registered till 1748; whereas his incumbrance was registered in 1746, immediately after its date. For the defendants it was argued that the deed of 1744 was not of such a nature as was required by the statute to be registered; the defendant therefore had a prior title.

Sir J. Strange, M. R. — Consider the intent and meaning of the act; this case is clearly within the mischief recited; for here is a person, in 1746, lending out his money on land security; and what is to defeat him is a deed in 1744 prior to him. He is clearly the very person intended, being by a secret or pocket deed to be defeated of the incumbrance he has advanced his money for, and taken care to register. He used all due diligence required by the statute, and is therefore *prima facie* entitled to the relief prayed. Next consider whether the deed or instrument is of such a nature as to be within the provision of this act. The words are general, all deeds and conveyances: this is undoubtedly a deed, was executed as such, and conveys so as to affect lands, tenements, and hereditaments; because those claiming under the power, claim under a deed, which, as far as it can operate, affects lands, &c. But it is said, this deed is not to be considered as a separate conveyance, but only as the execution of a power, and that all of it arises under the deed of 1742. If that construction were to prevail, there would be an end of the registry, and of the act of parliament; for by this means a secret deed might be set up to defeat them. This then being a conveyance actually affecting the lands, though in virtue of a preceding power in another deed, is within the intent of the statute; and, to the most common understanding, such a conveyance as ought to have been registered: otherwise an innocent person, induced to lend his money on land security, would be defeated. The plaintiff is therefore to be considered as a prior incumbrancer."

Registering an Assignment is not a Register of the Lease.

14. The registering an assignment of a lease will not operate as a register of the original lease.

15. The defendant claimed under a lease made in

Honeycomb v. Waldron, 2 Stra. 1064.

1730 by Lord Grandison, which was soon after mortgaged, and in 1731 sold to the defendant. The original lease was not registered, but the first mortgage of it, and the defendant's purchase, were; and it not being a lease at rack rent, the question was, whether this was a registry within the meaning of the statute. And the Chief Justice held it not to be sufficient; for the act says, the deed under which the party claims, with the witnesses names, shall be registered: and of this a subsequent purchaser can have no notice by the bare registry of the assignment: and it is also required that the original be produced to the officer.

Registering is not Notice.

16. It appears to have been the intention of those who framed the register acts, that the registering a memorial of a deed, pursuant to these acts, should operate as a notice of such deed to all persons whatever; and that in all cases of registry, which is a public depository for deeds, and to which any person may resort, a purchaser ought to search, or be bound by notice of the registry, as he would of a decree in equity, or a judgment at law.

The courts of equity have however adopted a very different construction of the register acts; and have determined that the registering a memorial of a second mortgage, is not constructive notice to the first mortgagee, who may therefore advance more money on the first mortgage.

Vide Tit. 15. c. 5. § 27.

Bedford v. Backhouse. Rigge on Regist. 6. Amb. 680.

17. A. lent money on lands, the mortgage being duly registered: afterwards B. lent money on mortgage on the same security, and his mortgage was also duly registered; and then A. advanced a further sum of money on the same lands, without notice of the second mortgage. It was held by Lord King, that the registering of the second mortgage was not

constructive notice to the first mortgagee, before his advancement of the latter sum; for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before.

18. One Wrightson advanced 800*l.* on a mortgage in Yorkshire, and registered his mortgage; afterwards one Hudson lent a sum of money on the security of the same lands, and took a judgment for it, which was registered; and then Wrightson advanced £70*l.* more, without any express notice of Hudson's judgment. Though it was argued, on a bill brought by Wrightson to foreclose, that Hudson ought to redeem, upon paying the first mortgage; for that where such registers prevail, every incumbrance should be satisfied, according to the priority of its registry; and that the registering of Hudson's judgment was a constructive notice to Wrightson, sufficient to deprive him of the common benefit of a court of equity, whereby a first mortgagee without notice is to hold, till subsequent incumbrances are discharged. Wrightson v. Hudson, Rigg. 6.

It was however resolved, that these statutes only avoid prior charges not registered; but do not give subsequent conveyances any further force against prior ones registered, than they had before: that to have affected Wrightson, Hudson ought to have given him notice when he advanced his money: and that though Wrightson might have searched the register, he was not bound to do it. And therefore it was decreed that Hudson and the mortgagor should be foreclosed, unless they paid off both the plaintiff's securities.

19. One Wilson being indebted to Morecock, and having taken a new lease of some lands, it was Morecock v. Dickins, Amb. 678.

agreed by deed, that the lease should stand as a security for 800 *l.* and interest, and the deed was registered. Wilson afterwards mortgaged the premises comprised in the lease to Dickins for 800 *l.* and delivered him the lease. Dickins had no notice of Morecock's security at the time he took the mortgage. Wilson became a bankrupt, and Morecock filed his bill to be paid the money agreed to be secured on the premises, prior to Dickins's mortgage. Dickins filed his bill to be paid his mortgage money or to foreclose. The question was, whether Dickins, though he had not actual notice of Morecock's security at the time he took the mortgage, should be affected by a constructive notice, arising from the circumstance of the deed being registered at the time. It was admitted by the counsel for Morecock, that Dickins having got the legal interest, would be entitled to priority, unless he could be affected by notice. That there was no evidence of actual notice, but it was insisted that the registration was notice of itself. That to give the register acts their proper and intended effect, the act of registration ought to operate as notice. And it was compared to the case of judgments; that which was first docketed had priority.

On the other side it was argued for the defendant Dickins, that the register acts were made for one single purpose; to give preference to a purchase deed registered, before a prior deed not registered. But the act gave no greater efficacy to deeds which were registered, than they had before, and the case of Bedford v. Backhouse was cited for that purpose. That in the present case Dickins, having got the legal interest, was entitled to be paid before a prior equitable incumbrancer, unless he was affected by notice

ante, § 17.

That here was no actual notice; and the registration was not constructive notice, according to the above determination.

Lord Camden.—The question is, whether registration is presumptive notice to all mankind. If this was a new point, it might admit of difficulty; but the determination in Bedford v. Backhouse seems to have settled it, and it would be mischievous to disturb it. The register acts provide for one single case only, that is, to make unregistered deeds void against registered deeds; but there is no provision in these acts, in a case where all the deeds are registered. And yet it becomes a serious question whether a court of equity should not say, that in all cases of registry, which is a public depository for deeds, and to which any person may resort, a subsequent purchaser ought not to search, or be bound by notice of the registry, as he would of a decree in equity, or a judgment at law. It is a point in which a great deal of property is concerned, and is a matter of consequence. Much property has been settled, and conveyancers have proceeded upon the ground of that determination.

ante, § 17.

In the case of Vandebendy in the House of Lords, the doctrine about dower prevailed, because it had been practised in a course of conveyance. A thousand neglects to search have been occasioned by the determination in Bedford v. Backhouse, and therefore I cannot take upon me to alter it. If it was a new case, I should have my doubts; but the point is closed by that determination, which has been acquiesced in ever since.

Tit. 12. c. 3. § 41.

Williams v. Sorrell, Tit. 15. c. 2. § 34.

20. The courts of equity have in another instance considerably weakened the operation of the register acts, by laying it down as a rule, that where a subse-

Notice takes away the Effect of registering.

quent purchaser, whose deed is registered, has notice of a prior incumbrance at the time of his purchase, although the deed by which such prior incumbrance was created be not registered, such prior incumbrance shall, notwithstanding, take place of the deed so registered. For the object of the register acts being to give notice to subsequent purchasers, if a subsequent purchaser has notice, at the time of his purchase, of a prior conveyance, then it is not a secret conveyance by which he can be prejudiced; but he is in the same situation as if these acts had never been made; for his notice of the prior conveyance is as strong as if it had been registered; and it is his own folly if he proceeds in his purchase.

Cowp. 712.

Forbes v. Deniston, 4 Bro. Parl. Ca. 189.

21. The first case on this subject arose in Ireland, where there is a general register act, nearly similar to those in England. Lord Granard being tenant for life, remainder to his first and other sons, with a power of leasing, granted a lease for three lives, at a rent of 30*l. per annum*, which was not registered. Lord G., being greatly in debt, came to an agreement with Lord Forbes, his eldest son, by the agency of Mr. Stewart, to sell him his life estate, upon Lord Forbes's paying his father's debts, and securing him an annuity, and a jointure to his wife. The estate was accordingly conveyed to two persons, in trust for Lord Forbes; and it was proved that, during the treaty for the purchase, Mr. Stewart, Lord Forbes's agent, had notice of the lease. The conveyance to the trustees being registered, they brought an ejectment against the lessee, and obtained judgment. The lessee applied to the Court of Chancery, and, upon proving that Stewart had notice of the lease at the time of the purchase, the Lord Chancellor decreed that a perpetual injunction should be awarded against Lord Forbes and his trustees.

From this decree there was an appeal to the House of Lords of England; and it was insisted, on behalf of the appellants, that it was against the plain words and intent of the register act, which made prior conveyances, not registered, fraudulent and void against subsequent conveyances, which were registered, as well in equity as at law; and especially in this case, where the appellant, Lord Forbes, was a purchaser for a valuable consideration.

On the other side it was argued, that if the registry of Lord Forbes's deed, after his having had full notice of the respondent's lease, should be a means of avoiding it, for no other reason than because it was not registered, the act of Parliament, instead of suppressing fraud, would be made use of to establish fraud.

The decree was reversed in part, the injunction being restrained to the life of Lord Granard; but as to the principal point the decree was affirmed.

22. In a case between two purchasers of lands in Yorkshire, where the second purchaser, having notice of the first purchase, but that it was not registered, went on and purchased the same estate, and got his purchase registered, it was decreed that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered was a fraud; the design of those acts being, only to give parties notice, who might otherwise, without such registry, be in danger of being imposed on by a prior purchase or mortgage, which they were in no danger of when they had notice in any manner, though not by the registry.

Blades v. Blades, 1 Ab. Eq. 358. 3 Atk. 654.

23. A person purchased a term for years in the county of Middlesex, knowing that it was chargeable with the payment of an annuity of 40*l.*; and having registered his own conveyance, he refused to pay the

Chival v. Nicholls, 1 Stra. 664. 2 Ab. Eq. 63.

annuity, because it was not registered. The Court of Exchequer was of opinion that the purchaser was liable to the annuity, although it was not registered; for the statute only intended to give such notice of former incumbrances to purchasers, that they might not thereby be defrauded. But if a man knows, of his own knowledge, that there is a prior incumbrance, and, notwithstanding that knowledge, becomes a purchaser, the statute never was intended to relieve such a person, though the first incumbrance was not registered: for where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience, and therefore his purchase will never be established in a Court of Equity.

24. The last case which has been reported on this subject was determined by Lord Hardwicke.

Le Neve v. Le Neve, MSS. 3 Atk. 646. 1 Ves. 64. Amb. 436.

The defendant, Edward Le Neve (father of the plaintiffs), in 1718, being possessed of leasehold estates in Kent and Middlesex, upon his marriage with his first wife, mother to the plaintiffs, in consideration thereof, and of the estate she was possessed of, by articles, covenanted to settle his leasehold estates upon trustees and their heirs, in trust for himself during his life; then as to so much of the premises as would amount to the yearly value of 250*l.* to Henrietta his intended wife for life, and as to the surplus, for the maintenance of the issue: and, after her decease, in trust, as to the whole, for the issue of the body of Edward Le Neve by Henrietta his wife, in such manner as he should by deed or will appoint; and in default of issue, in trust for himself and his heirs. In June 1719 a settlement was made in pursuance of these articles; but neither articles nor settlement were registered, pursuant to the 7th Ann. c. 20. for registering deeds in Middlesex. The defendant Edward had issue, by his first wife,

the two plaintiffs; and after his wife's death, 16th November 1719, he, in consideration of an intended marriage with the defendant Mary, settled the same estate on Norton and Dandridge, two trustees, in trust for himself for life; then, as to so much as would amount to 150*l. per annum*, to Mary his intended wife for life, and then to the issue of the marriage. A settlement was made January 20, 1743, pursuant to these articles, and both articles and settlement were registered pursuant to 7 Ann. c. 20. But, previous to the articles, Norton, one of the trustees, who was an attorney, and trusted by both parties in preparing the settlement, had a copy of the articles made upon the first marriage, to take counsel's opinion upon.

The plaintiffs brought their bill against Edward Le Neve, and Mary his second wife, and the trustees in the second articles and settlement, and against some mortgagees of Edward Le Neve, to set aside the second articles and settlement, upon account of notice of the first to the trustee; and to have the estate disincumbered from the mortgages made by Edward Le Neve.

The Court, after having taken time to consider the case, gave judgment.

Lord Chancellor. — The general question in this case is, whether there appears a sufficient equity for the plaintiffs to set aside the second settlement, and to get the better of the legal estate, which by the registry is vested in the trustees of that settlement, for want of registering the first articles and settlement. This wholly depends upon the point of notice, and is properly to be divided into three questions. 1°. Whether it appears that Norton was attorney or agent for Mary Le Neve the second wife. 2°. Whether notice to Norton be sufficiently proved

according to the rules of this Court. And 3d. Whether, if both these appear, there be sufficient to postpone the second articles and settlement, and to give priority to the first, notwithstanding the registry act.

As to the first question, it depends on the admission in Mrs. Le Neve's answer, wherein she denies notice of the former settlement; but this amounts to no more than a denial of personal notice. And she says that Norton was attorney or agent for her husband, but that she consented he should prepare the marriage articles, she having confidence in him, upon her husband's recommendation. Now, if she confided in Norton, it is not material upon whose recommendation it was; nor is it material whether he was or was not employed by her husband.

2 Vern. 674, 609. Lord Hardwicke then cited the cases of Brotherton v. Hatt, and Jennings v. Moore, and said those cases proved it not to be material by whom Norton was originally employed, if he was trusted by Mrs. Le Neve.

As to the second question, it was objected for Mrs. Le Neve, that notice being denied by her answer, and proved only by one witness, it was not therefore proved sufficiently within the rules of the Court. But I take the rule of Court, that where a fact is denied by an answer, it must be proved by more than one witness, to hold only where the answer contains an absolute denial of the same fact, which is proved by the witness. But where there is any difference between the facts, the rule does not prevail. In this case the denial is only general; whereas the bill charges notice to Norton and Dandridge, the trustees. This general denial amounts only to a denial of personal notice to herself, and is a kind of negative pregnant, which may be consistent with notice to

her agent. Norton, the trustee, being examined for the plaintiffs, proves that a copy of the first articles was delivered to him, to take counsel's opinion upon, which was probably on occasion of the second settlement; and I take this to be a sufficient proof of notice within the rule of this Court.

The third and principal question is, whether the second articles and settlement shall be postponed to the first, notwithstanding the legal estate vested by the registry of the act, by reason of the notice; which I shall consider, whether sufficient or not for that purpose; first, if it had been personal; 2° As the case is, where notice was given to the agent. The question is of great extent, and depends on the construction of the statute 7 Ann 20. By the recital in the preamble of that act, it appears, the intent was to secure purchasers against *prior and secret conveyances, and fraudulent incumbrances*; so that the mischief intended to be obviated by the act arose only in respect of the secrecy of former incumbrances. But if a person has notice of a prior incumbrance, it cannot be secret as to him. It was said that this act intended to establish a particular kind of notice, viz. by registering the conveyance. But this is only with regard to the legal estate, and the act does not take away the equity of the prior incumbrancer, but leaves the question still as open to him; and the subsequent purchaser, if he had notice, can be in no danger from a *secret* conveyance. The present case has been properly compared to that of the enrolment of bargains and sales within 27 Hen. 8., which act, though not in the same words, is to the same effect as that under consideration. Now, upon that act, if there be a prior bargainee whose deed is not enrolled, and a second whose deed is properly enrolled, if this last had notice of the prior deed, the prior shall prevail in

equity: and if he has any other conveyance, as a feoffment or a lease and release, the first vendee shall likewise prevail at law. I consider this registry act upon the same footing as the 27 Hen. 8., and that it shall control only the legal estate. The case put at the bar, that if a man employs an attorney to register his deed, which he neglects to do, and afterwards gets another conveyance of the same estate, which he registers, the first deed shall prevail, is material. So, if another person, not an attorney, purchases with notice of a prior incumbrance. These cases, though clear, and stronger than the present, show that there may be relief in equity, notwithstanding the registry act.

ante, § 21.

The case of Lord Forbes v. Deniston in the House of Lords, 27th Feb. 1722, which came from Ireland, where there is an act for a general register, is applicable to this question. There the late Earl of Granard had made a lease, which was not registered pursuant to the Irish act. He and his son Lord Forbes afterwards made a subsequent conveyance to the use of Lord Forbes, &c., which last was duly registered, and carried the legal estate; but an agent of Lord Forbes had notice of the lease before this conveyance. This cause was twice heard in Ireland, on the last of which hearings, before Lord Middleton, 17th Feb. 1721, he decreed a perpetual injunction against Lord Forbes, to restrain his proceeding against the lessees under the lease, which was not registered. On hearing the cause in the House of Lords, February 1722, the decree was reversed, because Lord Forbes disputed his father the Earl of Granard's power of leasing for any longer term than during his life. The Lords therefore adjudged that all proceedings against the lessees (except for breach of covenants) should be stayed during the Earl of Granard's life, and then Lord Forbes to be at liberty to try his

right. So that they gave the lessees full relief as to the registry act; though the other question as to Lord Granard's power of leasing was still left open. In Blades v. Blades, before Lord King, 2d May 1727, a mortgage from an heir at law, who had notice of a will whereby the estate was devised to another, was decreed fraudulent and void against the devisee, though the will was not registered; which I the rather cite, because Lord King generally adhered to the law as much as any person that has sat in this Court. There was a case of Chival v. Nichols and Hall in Scacc.; in Lord Chief Baron Gilbert's time, where relief was given against the registry act upon equitable circumstances; which I mention only as a general authority, that equity may prevail against this act, without taking notice of the particular state of that case, where actual fraud was charged. But that of Blades v. Blades went merely on the point of notice; and in that of Lord Forbes there was notice only to the agent. All these authorities prove that the taking a legal conveyance, after notice of a former, is in itself a species of fraud, and takes away the *bona fides* of the subsequent incumbrancer, and puts him in *malâ fide*: for though he knew the first conveyance was not legal, yet he knew that the grantor's conscience was bound by it; and this is within the definition of *dolus malus* by the civil law; Dig. lib. 4. tit. 3. *de dolo malo*, l. 3. s. 2. where Labeo defines it, *omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum, alterum, adhibitam.* This is the true ground of the determinations in all cases of notice.

ante, § 22.

ante, § 23.

If this be so as to notice in general, we are next to consider whether notice to the attorney or agent be sufficient. Now, if the ground of the determination be *mala fides*, it is all one whether it be in the

party or in the agent. It is proved by Norton that the first articles were put into his hands, to advise with counsel; and it is objected that this may have been a fraud in Norton, in collusion with the husband, upon the defendant Mrs. Le Neve. This may be the case; but who ought to suffer but the party who trusted Norton, the agent? and not those who did not trust him. In the case of Brotherton v. Hatt, it is probable the subsequent mortgagee was imposed upon; and so probably was the purchaser in Moore v. Jennings. And if I should determine this not to be a good notice, it would overturn all the cases of notice to the agent, who probably, in all those instances, imposed upon his principal. Here Norton was a trustee, and privy to the whole transaction; and I am therefore of opinion, that, both as agent and trustee, notice to him was good notice to the party; and that this is sufficient to take the case out of the registry act.

ante, pa. 552.

The Notice must be fully proved.

25. But unless notice of a prior deed or incumbrance be fully proved, and there appear to have been some fraud, the Court of Chancery will not give any relief.

Hine v. Dodd, 2 Atk. 275.

26. A bill was brought by a judgment creditor, to be let in upon the estate of one Proof and his wife in Middlesex, preferably to the defendant, who was mortgagee of the same estate, upon a suggestion that the defendant had notice of the judgment before the mortgage was executed; and likewise to inquire into the consideration of the mortgage. The judgment was entered on the 12th March 1733, but not registered till the 12th of June 1735. The mortgage was made the 24th of May 1735, and registered the 2d June 1735.

Lord Hardwicke.—This case depends upon the notice the defendant had of the judgment before

his mortgage was registered. The register act 27 Ann. c. 20. is notice to the parties, and a notice to every body; and the meaning of this act was to prevent parole proofs of notice or not notice. But, notwithstanding, there are cases where this Court has broke in upon this, though one incumbrance was registered before another; but it was in cases of fraud. The first was an Irish case in the House of Lords; the next was a Yorkshire case before Lord King. There may possibly have been cases upon notice divested of fraud, but then the proof must be extremely clear. But though in the present case there are strong circumstances of notice before the execution of the mortgage, yet, upon mere suspicion only, I will not overturn a positive law. He observed upon the evidence, that there was barely the evidence of a defendant's confession, in contradiction to his answer, and contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence. But what weighed principally with him was the great danger of overturning an act of parliament, and making it mere waste paper. To be sure, apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, was not sufficient to justify the Court in breaking in upon an act of parliament.

Forbes v. Deniston, Blades v. Blades. ante.

The Court therefore decreed, so far as the plaintiff's bill sought relief, by postponing the defendant's mortgage to the plaintiff's judgment, that it should be dismissed with costs.

27. In a modern case, a registered conveyance of premises in Middlesex, for valuable consideration, was established against a prior devise not registered; the evidence of notice, which ought to amount to actual notice, not being sufficient. And the Master

Jolland v. Stainbridge, 3 Ves. Jun. 478.

of the Rolls, (Sir R. P. Arden) said he regretted that the statute had been broken in upon by parole evidence; and was very glad to find that Lord Hardwicke, in Hine v. Dodd, had said that nothing short of fraud would do.

ante, § 26.

Utility of the Register Acts.

28. The utility of the register acts is proved to a demonstration by two facts; namely, that lands in register counties bear a higher price, and money is lent, on the security of those lands, at a lower rate of interest than on estates situate in counties where there is no register. It is therefore surprising that the legislature, with such proof before them, does not extend the register acts to all the counties in the kingdom. The reason usually given is, that the landed proprietors object to disclose the situation of their estates to the public; but, in point of fact, there is very little disclosure in a memorial drawn according to the rules prescribed by the register acts, as the consideration and uses of the deed need not be mentioned therein; nor does there appear to be any necessity for inserting more circumstances in a memorial than those which are expressly required by the register acts; for every person who is inclined to purchase or take a mortgage of lands lying in a register county, may know to a certainty, by an examination of the register, what conveyances have been made of those lands which can affect him; and if he afterwards purchases, or lends money on them, without requiring the production of all those deeds, it is his own fault, and he has no right to expect any redress.

29. The register acts would tend much more to the security of purchasers and mortgagees than they now do, if it were established that the registering a memorial of a deed should in all cases operate as notice, both at law and in equity, of such deed; and that no averment should be admitted, at law or in

1 Inst. 290 b. n. 1. § 11.

equity, that a person claiming under a deed which was registered, had notice of a prior unregistered deed.

Register of Annuities.

30. By the stat. 53 Geo. III. c. 141. it is enacted, that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall be granted for lives, or for years determinable on lives, a memorial of the date of every such deed, &c., of the names of all the parties, and of all the witnesses thereto, and of the persons for whose lives they shall be granted, and of the persons by whom the same are to be received, the pecuniary consideration, and the annual sums to be paid, shall be enrolled in Chancery in the form therein mentioned.

This act does not extend to Scotland or Ireland, nor to annuities given by will or marriage settlement, or for the advancement of a child, nor to annuities secured upon freehold or copyhold lands of equal or greater annual value than the interest of any sum charged thereon, whereof the grantor is seised in fee simple or fee tail, or secured by the actual transfer of stock; nor to any voluntary annuity, nor to annuities granted by bodies corporate, or trust created by act of parliament.

Register of the Bedford Level.

31. By the statute 15 Cha. II. c. 17. § 8. for settling the draining of Bedford Level, it is enacted, that all conveyances by indenture of the 95,000 acres contained within the said level, or any part thereof, entered with the register of the corporation in a book to be kept for that purpose, shall be of equal force to convey the freehold and inheritance thereof, as if the same conveyances by indenture were, for valuable considerations of money, enrolled within six months in one of the King's Courts of Record at Westminster; and no lease, grant, or conveyance of, or charge upon the same, except

Hodson v. Sharp, 10 East. 350.

leases for seven years, or under, in possession, shall be of force, but from the time it shall be entered with the register.

Enrolment of Deeds.

32. It is a common practice to enrol deeds for safe custody; that is, to get them transcribed upon the records of one of the King's Courts at Westminster, or at a court of quarter sessions.

33. Every deed, before it is enrolled, must be acknowledged to be the deed of the party before a Judge of the Court in which it is to be enrolled; or before a Master in Chancery, if intended to be enrolled in the Court of Chancery. This acknowledgment is signed by the Judge or Master in Chancery before whom it is acknowledged, and such signature is the officer's warrant for enrolling the deed.

2 Lilly's Pr. Reg. 69.

34. The enrolment of a deed does not make it a record, but it thereby becomes a deed recorded. For there is a difference between a matter of record and a thing recorded, to be kept in memory. A record is the entry in parchment of judicial matters controverted in a Court of Record, and whereof the Court takes notice; but an enrolment of a deed is a private act of the parties concerned, of which the Court takes no cognizance at the time when it is done.

2 Freem. 259.

35. Where deeds are enrolled for safe custody, the enrolment is evidence only against the party who sealed the deed, and all claiming under him; but the party enrolling can never afterwards aver that it was not his deed, or that he was within age, or under duress.

Bro. Ab. Tit. Faits Enrol. pl. 11.

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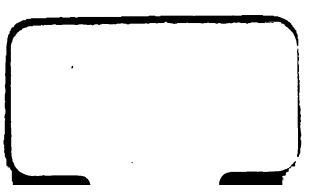
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